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**HARVARD LAW SCHOOL
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REPORTS
OF
CASES DECIDED
IN THE
APPELLATE COURT
OF THE
STATE OF INDIANA,

**WITH TABLES OF CASES REPORTED AND CITED, TEXT-BOOKS
CITED, STATUTES CITED AND CONSTRUED,
AND AN INDEX**

GEO. W. SELF,
OFFICIAL REPORTER

SOL. H. ESAREY, Assistant Reporter

VOL. 48

**CONTAINING CASES DECIDED AT THE MAY TERM, 1911. NOT
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JUDGES
OF THE
APPELLATE COURT

OF THE
STATE OF INDIANA,
WHOSE OPINIONS ARE CONTAINED IN THIS VOLUME.

HON. MOSES B. LAIRY.*¶
HON. EDWARD W. FELT.†¶
HON. MILTON B. HOTTEL.¶
HON. JOSEPH G. IBACH.¶
HON. ANDREW A. ADAMS.¶
HON. DAVID A. MYERS.††
HON. DANIEL W. COMSTOCK.§
HON. FRANK S. ROBY.†
HON. JOSEPH M. RABB.**
HON. WARD H. WATSON.**
HON. CASSIUS C. HADLEY.**

*Chief Judge at May Term, 1911.

†Presiding Judge at May Term, 1911.

§Elected in 1896; reelected in 1898, 1902 and 1906.

†Appointed March 21, 1901; elected in 1902 and 1906.

††Appointed October 18, 1904; elected in 1904 and 1908.

**Elected in 1906.

¶Elected in 1910.

OFFICERS
OF THE
SUPREME COURT

**ATTORNEY-GENERAL,
THOMAS M. HONAN**

**REPORTER,
GEO. W. SELF**

**CLERK,
J. FRED FRANCE**

**SHERIFF,
GEORGE R. HUTTO**

**LIBRARIAN,
OMAR O'HORROW**

CASES DECIDED
IN THE
APPELLATE COURT
OF THE
STATE OF INDIANA,
AT INDIANAPOLIS, MAY TERM, 1911, IN THE NINETY-
FIFTH YEAR OF THE STATE.

FERDINAND RAILWAY COMPANY v. LINK ET AL.

[No. 7,248. Filed June 1, 1911.]

1. **EMINENT DOMAIN.—Railroads.—Rights of Way.—Damages.—Evidence.**—A judgment for \$350 is not excessive for the appropriation of a railroad right of way running diagonally through an eighty-acre tract of land, taking two and eight-tenths acres therefrom and leaving a triangular tract of from eight to eleven acres on one side of the right of way, the grade of the road being two feet above the surface of the land and there being no place left for the drainage of such triangular tract, such land being valued at from thirty to sixty-five dollars an acre. p. 2.
2. **APPEAL.—Weighing Evidence.**—The Appellate Court will not weigh conflicting evidence, such duty devolving upon the trial court. p. 2.

From Dubois Circuit Court; *Thomas Duncan*, Special Judge.

Action by the Ferdinand Railway Company against Edward Link and another. From a judgment for defendants, plaintiff appeals. *Affirmed.*

C. M. C. Shanks and *R. W. Armstrong*, for appellant.

A. L. Gray, for appellees.

ADAMS, J.—Appellees are the owners of eighty acres of land in Dubois county. Appellant is a railway company, and in 1908 obtained a right of way across the lands of ap-

pellees by condemnation proceedings. The instrument of appropriation, filed by appellant, sought to acquire, over the lands of appellees a right of way six rods wide and one thousand, two hundred thirty-eight feet long, containing two and eight-tenths acres. Appraisers were appointed by the court, who assessed appellees' damages at \$225. Appellees filed exceptions to the award, and on the trial the court found for appellees, and fixed their damages at \$350. Appellant's motion for a new trial was overruled, and this action of the trial court is assigned as cause for reversal.

The only error argued by appellant is that the court erred in its award, and that the damages are excessive.

It is shown by the evidence that the right of way of appellant extends northwest and southeast through appellees' lands, cutting off from the main body a triangular
1. tract, estimated at from eight to eleven acres. This tract of land was valued by the different witnesses at from thirty to sixty-five dollars an acre, and the damages resulting to said land were estimated by the witnesses at from two dollars an acre to a total loss.

It is shown that the grade of the railroad across appellees' lands was from two to three feet above the level, and that appellees could not reach the tract thus cut off except by crossing the railroad right of way; that the drainage from the eleven-acre tract was to the north, and that no opening had been made across said right of way through which the water accumulating on said triangular tract might be carried off.

A large number of witnesses were examined, and the evidence, which covers about two hundred pages of the record, is conflicting both on the question of values and the question of damages. It is the duty of the trial court to weigh the evidence, and this court will not reverse a case

2. upon the proof, where there is any evidence in the record supporting the judgment. *Albaugh Bros., etc., Co. v. Lynas* (1911), 47 Ind. App. 30; *Heaston v. Gal-*

Krouse v. Krouse—48 Ind. App. 3.

lagher (1908), 41 Ind. App. 20; *Cleveland, etc., R. Co. v. Scott* (1907), 39 Ind. App. 420; *First Nat. Bank v. Beach* (1904), 34 Ind. App. 80; *Borrer v. Carrier* (1905), 34 Ind. App. 353.

From a careful reading of the evidence, we think the court below was fully warranted in awarding damages to appellees in the sum of \$350.

Judgment affirmed.

KROUSE v. KROUSE.

[No. 7,271. Filed June 2, 1911.]

1. **EVIDENCE.—Judicial Notice.—Sister-State Laws.—Rule of Decision.**—Courts do not take judicial notice of the laws of other states, and the law of the state in which the action is brought determines *prima facie* the rule of decision, a party depending upon the law of another state being required to plead and to prove it. p. 5.
2. **JUSTICES OF THE PEACE.—Procedure.—Defenses.—When Required to be Plead.**—In an action before a justice of the peace, all defenses except the statute of limitations, set-off, matter in abatement, and *non est factum*, may be given in evidence under the general denial (§1749 Burns 1908, §1460 R. S. 1881). p. 5.
3. **BILLS AND NOTES.—Execution in Another State.—Presumptions as to Law Governing.—California.—Civil Law.**—Though the ordinary presumption is that a note executed in another state is governed by the common law as interpreted and applied in this State, such presumption does not obtain for the State of California, the court taking judicial notice that it constituted a part of Mexico, and was not originally settled by English people, and was therefore governed by the civil law, unless such law was superseded by subsequent constitutional or statutory enactment. p. 5.
4. **EVIDENCE.—Judicial Notice.—Historical Facts.**—Courts of other states judicially know that the civil law prevailed in California at the time of its admission into the Union, but they do not judicially know whether the civil law has been changed since that time. p. 7.
5. **BILLS AND NOTES.—Execution in California.—Presumption as to Governing Law.**—There being no presumption that the common law prevails in California, such state having been governed by the civil law, the courts of this State, in an action upon a note executed in that state, will determine the validity of the note

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by the laws of this State, where the laws of California have not been proved. p. 8.

6. **BILLS AND NOTES.—*Husband to Wife.***—A note executed by a husband to his wife is not void because of the relationship of the parties. p. 8.
7. **BILLS AND NOTES.—*Duress.—Concealment of Husband's Clothing.—Attorneys.***—A wife who was living in separate apartments from her husband in San Francisco at the time of the San Francisco earthquake, and who concealed her husband's best suit and refused to disclose its whereabouts until he executed the note in suit which represented, as she claimed, a part only of his upkeep, is not guilty of duress of goods, as a matter of law, on the ground that her husband was a lawyer and was under the dire necessity of presenting a neat appearance to hold his clients, especially where there is a failure of proof that he had any clients. p. 8.
8. **APPEAL.—*Death.—Mandate.***—Where appellant dies before an affirmance of the judgment appealed from, it will be affirmed as of the date of submission. p. 11.

From Superior Court of Marion County (77,701); *Vinson Carter*, Judge.

Action by Susanna Krouse against Harry A. Krouse. From a judgment for plaintiff, defendant appeals. *Affirmed.*

Brown & Kepperley, for appellant.

John M. Wall, for appellee.

IBACH, J.—Appellee sued appellant on a note, which was in the following words and figures:

“I promise to pay to my wife (Mrs. H. A. Krouse), known as Maryland S. B. Sheppard, \$150, she has loaned me from time to time, at the end of three months, or before, if I am earning any money.

H. A. Krouse.”

April 29, 1906.

Not negotiable.

Mrs. T. O. Olsen.

The action was originally brought before a justice of the peace, and the transcript was filed in the circuit court on appeal. The only pleading filed was the complaint. The cause was tried without a jury. The court found against

appellant in the sum of \$173.25, and rendered judgment on the finding. The only error assigned is the overruling of appellant's motion for a new trial.

Appellant relies for reversal of the judgment on two points: (1) The note sued on is void because made by husband to wife, and as it was executed in California, in the absence of proof to the contrary, the presumption is that the common law prevails in a foreign state; (2) the note was executed under duress.

The first question then is, in the absence of proof, What is presumed to be the law of California?

Courts do not take judicial notice of the laws of other states, and in all cases the laws of the state in which an action is brought determine *prima facie* the rule of

1. decision. To obtain the benefit of a different rule, a party must aver it in his pleading, and make this rule a matter of proof. But the present suit was begun in the court of a justice of the peace, and under our code of

2. practice in such courts any matter of defense, except the statute of limitations, set-off, matter in abatement or denial of execution, may be given in evidence without plea. §1749 Burns 1908, §1460 R. S. 1881. It appears from the evidence that the note sued on was executed in California. In the absence of proof to the contrary,

3. the general presumption is that the common law prevails in another state, and the court will apply the common law according to its interpretation by the courts of the state of the forum. Therefore, appellant urges that, as no proof was made of the statute law of California, the rule is to presume the existence of the common law, and to be governed by its principles, and since, under the common law, there could be no valid contract between husband and wife, there can be no recovery in this action.

There would be some merit in this contention, had California been one of the original colonies of England, or been formed out of territory composing such colonies, for there

is no doubt that the common law is the basis of the laws in those states composing the territory originally comprised by the thirteen colonies. The early settlers brought it into our land, and established it as far as it was applicable to their conditions and circumstances. Consequently it is presumed that the common law still prevails in all the states that were formed from the colonies which recognized the common law as the source of their jurisprudence, and when one seeks to show that the common law does not at this time exist in such a state, but has been changed by statute, it is incumbent upon the person who asserts a different rule to show that fact by competent evidence.

Such is also the rule as to the states carved out of territory acquired since the time of the Revolution, which had not, at the time of acquisition, any organized form of society, or any established laws for the government of the people then living in such new possessions, where in fact the people of the state at the time of the establishment of government therein were emigrants from the original states. It is presumed that the common law was conveyed and became established there in the same manner that we are authorized to presume that it was brought by the American colonists from the mother country.

But such presumption does not apply to states in which a government and an established system of laws already existed at the time of their addition to the United States. Their original laws remained in force until, by proper authority, they were abrogated and other laws enacted. In states whose system of law was independent of the English law in its origin—such as Florida, Texas, Louisiana and California—there can be indulged no presumption of the existence of the English common law. In countries conquered and ceded to England, the common law does not take effect without positive enactment. *Norris v. Harris* (1860), 15 Cal. 226; *Buchanan v. Hubbard* (1889), 119 Ind. 187; 1 Blackstone's Comm. *107; Rorer, *Interstate Law* (2d ed.) 45.

It is a matter of history, that California was once a part of Mexico, and that the Mexican system of civil law was there established. During the Mexican war, California was conquered by the Americans, and for a time was governed by a mixed system of martial and civil law. By the treaty of peace with Mexico, a sum of money was paid to her as a partial remuneration for the territory, including California, ceded by her to the United States. The territory continued under a semi-military government for a short time, and then, Congress having failed to provide a new form of government, a constitutional convention was called by proclamation of Governor Bennett Riley. This proclamation states that "the laws of California, not inconsistent with the laws, constitution and treaties of the United States, are still in force, and must continue in force until changed by competent authority." The constitution of California, adopted at this convention, declares (Art. 12, §1,) that "all laws in force at the time of the adoption of this constitution, and not inconsistent therewith, until altered or repealed by the legislature, shall continue as if the same had not been adopted." This constitution was ratified by the people, was proclaimed on December 20, 1849, and, it having been approved by Congress, California was admitted as a state on September 9, 1850.

In the case of *Fowler v. Smith* (1852), 2 Cal. 568, the supreme court of that state said: "When the territory now comprised in the State of California was under Mexican dominion, its judicial system was that of the Roman law, modified by Spanish and Mexican legislation. Upon the formation of the present state government, that system was ordained by a constitutional provision to be continued, until it should be changed by the legislature."

It is thus a historical fact that the civil law prevailed in California at the time of its admission into the

4. Union. Courts take judicial notice of matters of history. They do not take judicial notice of statutes of

other states, and cannot judicially know whether the legislature of California has by statute changed the system of civil law once there established. Thus, the presumption that the common law prevails in California having

5. been removed by the historical fact that the civil law once prevailed there, this court must, as a matter of necessity, decide the case in accordance with our own laws. The present case falls within the rule laid down in the cases of *Buchanan v. Hubbard, supra*, and *Norris v. Harris, supra*, and will be governed by the law of Indiana; and as under our law the note is valid, the first reason assigned for reversal will not avail appellant.

The second question for consideration is, Do the facts disclosed by the evidence in the present case show that the note was executed under such duress as to render it

7. ineffectual? In the case of *LaFayette, etc., R. Co. v. Pattison* (1872), 41 Ind. 312, 327, the Supreme Court of this State made an exhaustive examination of the question of duress of property, and announced its conclusions as follows: "The foregoing authorities very fully establish the propositions, that the doctrine of duress applies to property as well as to the person, and that where one person is in possession of the goods or property of another, and refuses to deliver the same up to that other, unless the latter pays him a sum of money which he has no right to receive, and the latter, in order to obtain possession of his property, pays that sum, the money so paid is a payment by compulsion, and may be recovered back. * * * It is well settled, by an unbroken current of authorities in England and in this country, that money can be recovered back which has been procured through imposition, extortion, or oppression, or where an undue and unconscionable advantage has been taken of the situation or great and pressing necessity of a person, who, by means thereof, has been coerced into the payment, which gives such payment the character of a compulsory payment."

In the case of *Galusha v. Sherman* (1900), 105 Wis. 263, 81 N. W. 495, 47 L. R. A. 417, after a review of the later authorities, it is said: "The question in each case is, Was the alleged injured person, by being put in fear by the other party to the transaction for the purpose of obtaining an advantage over him, deprived of the free exercise of his will power, and was such advantage thereby obtained? If the proposition be determined in the affirmative, no matter what the nature of the threatened injury to such person, or his property, * * * the advantage thereby obtained can not be retained. The idea is that what constitutes duress is wholly a matter of law and is simply the deprivation by one person of the will power of another by putting such other in fear for the purpose of obtaining by that means, some valuable advantage of him. The means by which that condition of mind is produced are matters of fact, and whether such condition was in fact produced is usually wholly matter of fact, though of course the means may be so oppressive as to render the result an inference of law. * * * The condition of mind of a person produced by threats of some kind, rendering him incapable of exercising his free will, is what constitutes duress. The means used to produce that condition, the age, sex, and mental characteristics of the alleged injured party, are all evidentiary, merely, of the ultimate fact in issue, of whether such person was bereft of the free exercise of his will power. Obviously, what will accomplish such result cannot justly be tested by any other standard than that of the particular person acted upon. His resisting power, under all the circumstances of the situation, not any arbitrary standard, is to be considered in determining whether there was duress."

From the evidence in the case, it appears that appellant, who was an attorney, and appellee were husband and wife, living in San Francisco at the time of the earthquake and fire; that their marriage was not generally known, and that she, though living with him in his apartments, kept up sep-

arate apartments; that for a time after the earthquake, they, in company with many others, had lived much of the time in the parks; that on April 29, 1906, appellant, who had been wearing old clothes, went to his apartments to get his good clothes; that appellee had concealed them, and refused to let him have them until he signed the note in question. She testified that she had loaned money to appellant, including the price of the very suit of clothes that he was demanding; that she had borne the living expenses of the household; that he had taken money from her in the park, shortly before coming after his clothes, and in repayment of these amounts the note was given, as, at the time it was signed, she believed that he owed her \$153, though she later found that she had forgotten many items, and the amount was really more. Appellant denied that appellee had furnished him money to the amount of more than \$10.

Appellant's counsel set up a remarkable argument, the consideration of which somewhat relieves the monotony of the ordinary course of judicial decisions. They claim that appellant, a lawyer in San Francisco, a few days after the earthquake, relying only upon the practice of his profession for a livelihood, would have little opportunity for getting business, or of holding what he had, if he went about his professional duties clothed in a laboring man's garb; that the controlling necessity in the case required that he get suitable wearing apparel, or lose the chance of making a living; that this was one of the times when good clothes were of vital importance to a man; that appellant signed the note, protecting himself from his wife as best he could by writing in the note the words "Not negotiable," in order to get his clothes, which he needed, so that he could properly look after the interests of his clients, and, therefore, the note was signed under duress.

- This defense is interesting and ingenuous, and one worthy of a humorist. We know of nothing which requires a man to wear good clothes in order to practice law, and if ever a

lawyer could be excused for wearing old clothes, surely it would be after the San Francisco fire, when he would not be conspicuous by their wearing. It nowhere appears that appellant had any business or any clients requiring his attention, but it rather appears that because he had no business and no clients it was his intention to leave his wife and the city. There is evidence that he was indebted to his wife, and, in this view of the case, the giving of the note could not be payment to her of money which she had no right to receive, but merely a promise to pay money which she had a right to receive. She testified that appellant afterwards acknowledged the note, at least to the extent of offering worthless stocks in exchange for it. We cannot say, as a matter of law, that the withholding of personal property, which if wrongfully withheld could easily be recovered by legal process, constitutes duress, in the case of a lawyer who is supposed to have some acquaintance with the law. Admitting that his resisting power is to be taken into account in determining whether there was duress, we can find nothing to indicate that appellant was, by the refusal of his wife to surrender his clothes, which she had hidden in his own apartments, deprived of his free will to such an extent that he would sign a note when he owed her nothing. The trial court had before it both appellant and appellee, and was able to judge from appearance and actions whether appellant was a man of such weak resisting power that the circumstances attending the signing of the note amounted to duress. It decided that no duress existed. We can find no ground to decide otherwise.

No error appearing in the record, the judgment is

8. affirmed. The death of appellant having been suggested, the cause is affirmed as of date of submission.

Chicago, etc., R. Co. v. Ginther—48 Ind. App. 12.

CHICAGO AND ERIE RAILROAD COMPANY v. GINTHER,
ADMINISTRATOR.

[No. 6,618. Filed February 18, 1910. Rehearing denied December 15, 1910. Transfer denied June 2, 1911.]

1. NEGLIGENCE.—*Contributory.—Burden of Pleading and Proving.*—The burden of proving contributory negligence rests upon the defendant (§362 Burns 1908, Acts 1899 p. 58). pp. 13, 19, 20.
2. RAILROADS.—*Crossing Accidents.—Negligence.—Proximate Cause.—Complaint.*—A complaint alleging that plaintiff's decedent was driving a team hitched to a wagon over defendant railroad company's track on a highway crossing, that defendant negligently ran its train at an excessive speed and failed to sound the whistle or to ring the bell as it approached the crossing, that a storm was raging and decedent was unable to hear the train until it was too late, that the defendant negligently failed to place a headlight on the locomotive, and that the locomotive so negligently run "struck said team and wagon * * * and killed the decedent," sufficiently shows that the decedent was killed by the engine, and that the alleged negligence was the proximate cause of the death. p. 14.
3. APPEAL.—*Weighing Evidence.—Negligence.—Contributory.*—Where the evidence as to defendant's negligence and the decedent's contributory negligence is conflicting, the verdict of the jury is conclusive on appeal. p. 15.
4. RAILROADS.—*Crossing Accidents.—Failure to Give Signals.—Absence of Headlight.—Excessive Speed.—Contributory Negligence.—Instructions.*—In an action for the death of a traveler killed upon a highway crossing, an instruction that in determining the question of the decedent's contributory negligence the jury might consider the facts, if proved, that the defendant railroad company failed to sound the whistle or to ring the bell, as the train approached the crossing, and that the train was running without a headlight at a high speed on a dark, stormy night, was properly given. p. 15.
5. RAILROADS.—*Crossing Accidents.—Due Care.—Presumptions.*—A traveler killed on a highway crossing is presumed to have used due care as well as to have seen and heard what was visible and audible. p. 20.
6. RAILROADS.—*Crossing Accidents.—Contributory Negligence.—Evidence.*—In determining the question of the contributory negligence of a traveler injured or killed upon a highway crossing, the jury should consider all the circumstances, including the railroad company's conduct. p. 20.

Chicago, etc., R. Co. v. Ginther—48 Ind. App. 12.

From Pulaski Circuit Court; *J. C. Nye*, Judge.

Action by George A. Ginther, as administrator of the estate of Joseph W. Davis, deceased, against the Chicago and Erie Railroad Company. From a judgment for plaintiff for \$5,375, defendant appeals. *Affirmed.*

W. O. Johnson, George C. Gale, Henry A. Steis, Ulric Z. Wiley and *A. H. Jones*, for appellant.

M. Winfield and *M. M. Hathaway*, for appellee.

MYERS, C. J.—Appellee, administrator of the estate of Joseph W. Davis, deceased, recovered a judgment against appellant, whose train of cars ran down the decedent, while driving his team of horses attached to a wagon over a public crossing of appellant's railroad track, on a dark, rainy night.

A demurrer to the complaint for want of facts was overruled, as was also appellant's motion for a new trial.

It is claimed, on behalf of appellant, that there are no facts alleged in the complaint showing the negligent act complained of to have been the proximate cause of the injury; that the allegations do not sufficiently show that decedent was struck and killed by the engine, but only that it might be so inferred from the facts stated. It is also contended that the complaint does not sufficiently show that decedent exercised the care and caution required of him by law.

The burden as to contributory negligence being by statute (§362 Burns 1908, Acts 1899 p. 58) placed upon defendant, in a case for personal injury or death wrongfully

1. inflicted, it is not necessary for plaintiff to show affirmatively in the complaint that his decedent was free from fault, and we need not set forth allegations of the complaint with a view to determining whether they show freedom from fault, there being no claim that they affirmatively show fault on the part of decedent.

After alleging that it was a dark and stormy evening, and

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that the decedent was driving homeward, it was alleged that he drove his team upon the crossing, and as he entered thereon, going north, the train in question going east “at a high rate of speed and more than two hours late, propelled by a locomotive, struck said team and wagon with great force, killed said team of horses instantly, destroyed said wagon and harness, and killed decedent, * * * that decedent was killed solely by reason of being struck by said locomotive pulling said train; * * * that decedent was thus killed, and the team of horses and wagon destroyed, solely by and through the negligence of defendant, its agents and servants operating said train; that there was no headlight on the engine to give any warning; that no whistle was sounded nor bell rung for said crossing; that, by reason of the intense darkness, decedent could not see said train approaching; that, because the wind was blowing in the opposite direction to the approach of the train, he could not hear its approach; that if a headlight had been displayed on said locomotive, decedent could have seen the train in time to avoid the injury; that had the whistle been sounded within eighty rods and not more than one hundred rods from said crossing, decedent would have heard it and avoided the injury; that had said bell been rung continuously from a point not less than eighty rods nor more than one hundred rods from said crossing until said engine had approached said crossing, decedent would have heard it; that by reason of the aforesaid negligence on the part of defendant, by its agents and employes, in failing to have the headlight on its locomotive, and to sound the whistle and to ring the bell as aforesaid, decedent was lured to said place of danger and killed, and said team of horses and wagon were destroyed; * * * that under the rules of said company, and all other railroad companies, headlights are required to be displayed at night on the front of engines, which headlights give to persons who might be at or near crossings, notice of the approach of trains; that

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such was the rule of defendant railroad company at that time, and for a long time prior thereto; that on this particular evening of June 17, 1905, defendant's agents and servants in the employ of defendant, and while in the line of their employment, neglected and failed to have said headlight displayed on the front of the engine, but carelessly, negligently and recklessly ran said train on a dark and stormy night at a high rate of speed as aforesaid, without any such light; that by reason of the aforesaid facts, and the failure of the agents and servants of defendant in charge of said engine of said defendant to sound the whistle and ring the bell as aforesaid, decedent was killed, and not otherwise."

It might be said that the pleading is not well arranged, yet we think it not properly subject to the objections urged against it.

We are asked to reverse the judgment upon the evidence. While upon material matters of fact the evidence is quite conflicting and exceedingly persuasive of a different

3. conclusion from that reached by the jury, yet, after a careful analysis of it, we must conclude that there was such evidence upon the question of the negligence of appellant and the contributory negligence of decedent that it was properly left to the jury. This being true, we would not be authorized to reverse the judgment upon the evidence alone, without overreaching our true province.

It is earnestly argued that there was error in the instructions to the jury, on the ground that the court permitted the jury, in determining the question as to decedent's

4. contributory negligence, to take into consideration the effect upon his conduct of certain negligent acts or omissions on the part of appellant; as the failure to give the statutory signals and the failure to carry a lighted headlight upon the locomotive, running at a high rate of speed on a dark and stormy night.

In the same connection the court instructed the jury that

it was proper to consider all the evidence surrounding the accident, together with all the other evidence in the case showing the surroundings and opportunities, or want of opportunities, if any, the decedent had of seeing or hearing the approaching train. Also, the jury was instructed, at the request of the appellant, that it is a presumption of law that a traveler who is approaching and about to cross a railroad track saw whatever was within the range of his vision, had he looked, and heard whatever he might have heard had he listened, and if, on account of darkness, physical infirmities, the inclemency of the weather, or of other obstructions or hindrances, it was more difficult to see or hear, all the greater must be the precautions taken by the traveler, and, therefore, if the jury believed from all the evidence in the case, that, under the facts and circumstances shown in the case, decedent, if he had looked, could have seen, and if he had listened, could have heard the train which struck him in time to avoid the injury, then, notwithstanding it might believe appellant was guilty of negligence in failing to give the proper signals before the train reached the crossing where decedent was struck, and in failing to have a headlight lighted and burning on the engine which struck him, the verdict should be for appellant; and further, that it is the duty of a traveler upon a highway, in attempting to cross a railroad track, to look and listen attentively to determine whether it is safe for him to cross; and that if the jury believed from all the evidence in the case that decedent, before he came to the crossing where he was injured, by looking, could have seen, or, by listening, could have heard the approaching train in time to escape injury, then it will be presumed either that he did not look or listen, or that, if he did look and listen, he did not heed what he saw or heard, and, therefore, he would be guilty of contributory negligence, and appellee would not be entitled to recover in this case; further, that a railroad track is itself an admonition of danger, and a traveler on a public

highway is bound to know that there may be peril in attempting to cross, and that he must yield precedence to the train of the railroad company; further, that the failure of the railroad company to ring a bell, sound a whistle, or display a headlight, will not excuse the failure on the part of the traveler on a highway approaching a railroad crossing to use his senses of sight and hearing to discover whether there is danger in going upon the crossing; and that it is the presumption of law that every person is possessed of normal faculties, and that his eyesight and hearing are as good as the average, unless the contrary be shown by affirmative proof.

In the case of *Chicago, etc., R. Co. v. Hedges* (1886), 105 Ind. 398, 407, it was said that "if there was any evidence tending to show that the plaintiff's intestate was thrown off his guard by such means as might have such effect upon an ordinarily prudent man, * * * it was not wrong to submit to the jury the question of contributory negligence." In that case, *Indianapolis, etc., R. Co. v. McLin* (1882), 82 Ind. 435, was cited, wherein it was said that "while it is true that the failure of appellant to give warning did not relieve the appellee's son from exercising care to avoid injury, yet the absence of such warning is a circumstance to be taken into consideration in determining whether he did exercise the degree of care required or not."

In the case of *Terre Haute, etc., R. Co. v. Brunner* (1891), 128 Ind. 542, it was held that travelers upon a highway, approaching a railway crossing, have a right to rely upon the giving of the signal, and that as between the railroad company and the traveler approaching cautiously, the company is at fault if, by failing to give the lawful signals, it induced the traveler to approach within an unsafe proximity to the crossing. Citing *Indianapolis, etc., R. Co. v. McLin*, *supra*, and other cases.

In the case of *Cleveland, etc., R. Co. v. Harrington* (1892), 131 Ind. 426, it was said: "In the absence of some evidence

to the contrary, we think the appellee had the right to presume that the appellant would obey the city ordinance and would not run its trains at a greater rate of speed than four miles an hour at the point where the injury occurred, and while the wrongful conduct of the appellant in this regard would not excuse her from the exercise of reasonable care, yet in determining whether she did use such care her conduct is to be judged in the light of such presumption.”

In the case of *Chicago, etc., R. Co. v. Boggs* (1885), 101 Ind. 522, 527, 51 Am. Rep. 761, it was said: “It is, indeed, a general rule that citizens have a right, within reasonable limits, to act upon the presumption that a corporation charged with a duty will perform it.”

In the case of *Pittsburgh, etc., R. Co. v. Martin* (1882), 82 Ind. 476, 483, the court said: “The signal required by the law not being given, the view being obstructed, and the plaintiff not being hard of hearing, he had no reason to suppose that the train was within eighty rods of the crossing; he was misled by the defendant’s negligence in omitting the proper signal; he was not guilty of negligence in assuming, in the absence of any indication to the contrary, that the company was obeying the law, and that no engine was advancing toward the crossing within a distance of eighty rods.” See, also, *Pittsburgh, etc., R. Co. v. Burton* (1894), 139 Ind. 357, 376.

In the case of *Malott v. Hawkins* (1902), 159 Ind. 127, 135, the court, after referring to the precaution to be taken by travelers upon a highway in approaching a railroad crossing, said: “A further proposition, based on the reciprocal rights of the railway company and a traveler at a public crossing, is that after a traveler has vigilantly used his senses to avoid danger, as stated above, and is unable to see or hear any approaching train, he may, while still exercising due care, assume that the company will not omit to give the usual, and especially the statutory signals, if a train

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is really approaching. * * * The omission to give signals may, therefore, be an element in determining the question of contributory negligence.”

In the case of *New York, etc., R. Co. v. Robbins* (1906), 38 Ind. App. 172, this court said: “The crossing signals were not given; and, while this did not excuse the decedent from the exercise of ordinary care, the jury had the right to take that fact into consideration in determining whether the decedent did exercise the degree of care required.” See, also, *Grand Rapids, etc., R. Co. v. Cox* (1893), 8 Ind. App. 29; *Wabash R. Co. v. Biddle* (1901), 27 Ind. App. 161; *Baltimore, etc., R. Co. v. Rosborough* (1907), 40 Ind. App. 14; *Cleveland, etc., R. Co. v. Schneider* (1907), 40 Ind. App. 38.

Counsel for appellant direct our attention to the case of *Louisville, etc., R. Co. v. Stommel* (1890), 126 Ind. 35. After all that was said in that case apparently in favor of the contention of appellant, the question of contributory negligence of appellee’s servant was left to depend upon what he did “in the light of the *res gestae*.” At all events, the later decisions heretofore noticed, make it clear that the position of appellant is not tenable. It is true the merely negligent quality of the acts or omissions of defendant cannot determine that the conduct of plaintiff was negligent; but the acts or omissions of defendant may constitute parts of the circumstances in which plaintiff’s decedent was involved, and so may aid as facts in determining the question as to the prudence or imprudence of the traveler approaching the crossing.

In the case at bar, the burden was upon appellant to prove the contributory negligence of appellee’s decedent. The

openness of the country between decedent and the
1. railroad track for a considerable distance in the direction from which the train approached was shown; but it was exceedingly dark and there was a drizzling rain, with

frequent lightning and thunder, and the wind blew in a direction other than from the approaching train to decedent.

The presumption in the decedent's favor, that he did not fail to exercise due care, could not be met by proof that he failed to look and listen, for he was traveling alone

5. in the dark. But "a traveler approaching a railroad crossing of a highway is presumed in law to have seen what he could have seen, if he had looked attentively, and to have heard what he could have heard, if he had listened attentively." *Pittsburgh, etc., R. Co. v. Frazee* (1898), 150 Ind. 576. See, also, *Malott v. Hawkins, supra*.

In the case last mentioned it was held that our statute, relating to the burden of proof as to contributory negligence in such a case as this, does not abate the legal requirements that a traveler crossing a railroad track must use, or change the rule that it is presumed that the traveler saw and heard, or was heedless of that which, as an ordinarily prudent man, he ought to have taken notice. Of course,

1. the burden of proof as to the facts from which a conclusion of contributory negligence arises is upon defendant. If it be material in such a matter to show that the country was open, without obstruction to sight and sound, it is not immaterial that the night was dark

6. and stormy, with lightning, thunder, and wind blowing in such direction as not to carry sound of the moving train to the traveler, and in such case it cannot be said that the failure to give the statutory signals, and to carry the usual headlight, might not properly be considered by the jury in determining whether the traveler acted with ordinary prudence.

We find no available error. Judgment affirmed.

OLIVER TYPEWRITER COMPANY v. VANCE.

[No. 7,140. Filed June 6, 1911.]

1. **PLEADING.—Complaint.—Amendment.**—The filing of an amended complaint takes the original complaint and the rulings thereon out of the record. p. 22.
2. **WORK AND LABOR.—Contracts.—Complaint.—Bills of Particulars.**—A complaint for services, to which, immediately after the body thereof, a bill of particulars was subjoined, showing the items of such work, is sufficient when questioned for the first time on appeal, or by motion in arrest, after verdict, though such bill is nowhere, in the body of the complaint, referred to or made a part thereof. p. 22.
3. **APPEAL.—Weighing Evidence.**—The Appellate Court will not weigh conflicting evidence. p. 23.

From Fayette Circuit Court; *George L. Gray*, Judge.

Action by Charles F. Vance against the Oliver Typewriter Company. From a judgment for plaintiff, defendant appeals. *Affirmed.*

Charles W. Neff and *T. J. Moll*, for appellant.

Charles F. Vance, in pro. per. for appellee.

FELT, P. J.—Appellee recovered judgment against appellant for \$70, from which this appeal is taken.

The errors assigned are: (1) The amended complaint does not state facts sufficient to constitute a cause of action, and (2) the overruling of appellant's motion for a new trial.

The new trial was asked on the grounds that the verdict of the jury is not sustained by sufficient evidence and is contrary to law, and that the damages are excessive.

The amended complaint averred, in substance, that appellee was employed by appellant, at its special instance and request, as its representative and salesman, and continued in said employment for one month; that appellant agreed to pay him for his services the sum of \$50 a month and expenses, amounting in all to \$75; that no part thereof has been paid, and there is due appellee the sum of \$75. Prayer for \$100. Immediately following the body of the complaint

is the heading, "Bill of Particulars," showing an account of \$50 for salary and \$45 for meals, and two other items of \$1 each, aggregating \$97.

Appellant contends that the amended complaint is identical with the original, and that, as a demurrer was presented and overruled to the original complaint, it

1. should have the benefit of that demurrer here. But the filing of the amended complaint took the original complaint and all rulings thereon out of the record, and the amended complaint is questioned for the first time by the assignment of errors. *Tague v. Owens* (1894), 11 Ind. App. 200; *Efroymson v. Smith* (1902), 29 Ind. App. 451.

The principal objection urged to the amended complaint is that the bill of particulars is not referred to in the complaint, or in any way made a part thereof, though it

2. immediately follows the body of the complaint. The pleading is not to be commended, but when the sufficiency of the complaint is questioned after verdict by motion in arrest of judgment, or by assignment of error, as in this case, all intendments are in favor of the pleading, and if there is not a total failure to state some essential element of the right of recovery, and the complaint states facts sufficient to bar another suit for the same cause of action, the verdict cures all other defects, and the complaint will be held sufficient to sustain the judgment. *Peoria, etc., R. Co. v. Attica, etc., R. Co.* (1900), 154 Ind. 218; *City of South Bend v. Turner* (1901), 156 Ind. 418, 421, 54 L. R. A. 396, 83 Am. St. 200; *Colchen v. Ninde* (1889), 120 Ind. 88; *Elwood State Bank v. Mock* (1907), 40 Ind. App. 685; *Xenia Real Estate Co. v. Macy* (1897), 147 Ind. 568; *Peters v. Banta* (1889), 120 Ind. 416, 420; *Gish v. Gish* (1893), 7 Ind. App. 104, 114; *Galvin v. Woollen* (1879), 66 Ind. 464, 466; *Lassiter v. Jackman* (1882), 88 Ind. 118.

The exact point raised by appellant, in regard to the exhibit, is decided in several of the cases just cited. The other objections to the complaint are not well taken, and it is

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clearly sufficient to withstand the attack made upon it after verdict.

We cannot weigh the evidence where there is a conflict, and decide the case upon the weight of the testimony. There

was a conflict of evidence in this case, but there is

3. legal evidence tending to support the verdict, and it is the long-established rule that in such cases the judgment will not be reversed on the weight of the evidence. *Cleveland, etc., R. Co. v. Kepler* (1903), 31 Ind. App. 1; *Bower v. Bowen* (1894), 139 Ind. 31, 36.

There is no available error in the record. Judgment affirmed.

SHEDD, RECEIVER, v. AMERICAN CREDIT INDEMNITY COMPANY OF NEW YORK.

[No. 7,261. Filed June 6, 1911.]

1. **INSURANCE.—Credit Indemnity.—Failure to Perform Contract.—Waiver.—Complaint.**—A complaint upon a credit indemnity insurance contract, which shows that a provision of the policy was not complied with by assured, is bad, unless a waiver thereof is shown. p. 28.
2. **INSURANCE.—Contracts.—Obligation of.**—A provision in an insurance indemnity contract requiring the assured to file a final statement of its claim "in the manner prescribed by" the insurer, "upon blank forms" furnished upon application, is not ambiguous, and is binding upon the parties, unless waived. p. 28.
3. **INSURANCE.—Contracts.—Construction.**—Doubtful insurance contracts will be construed most strongly against the insurer, but a new contract will not be made by the court, and the provisions of the contract actually made, when free from fraud and not waived, will be enforced. p. 28.
4. **WAIVER.—Definition.—Insurance.**—Waiver imports the intentional relinquishment of a known right; an election to dispense with something of value, or to forego some advantage. p. 28.
5. **INSURANCE.—Waiver.—Custom.**—The custom of an insurance company followed for many years under former contracts, with reference to the reporting and adjusting of the plaintiff's losses by insolvency, cannot form the basis for a waiver of a provision in the present policy, identical with former ones, that the as-

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sured, within thirty days from the expiration of the policy, shall make "a final statement of the claim * * * in the manner prescribed * * * upon blank forms * * * furnished upon application." pp. 29, 30.

6. **CONTRACTS.—Waiver.—Custom.**—Custom cannot control a contract in direct conflict therewith. p. 30.

7. **INSURANCE.—Indemnity.—Reports.**—A credit indemnity policy providing that the assured within thirty days from the expiration of the policy shall make "a final statement of the claim * * * in the manner prescribed * * * upon blank forms * * * furnished upon application" requires the assured to make the application for such blanks as a condition precedent to fixing a liability upon the insurer. p. 30.

8. **INSURANCE.—Credit Indemnity.—Current and Final Reports.—Waiver.**—A credit indemnity policy which provides in one section that the assured shall notify the insurer "within twenty days after the indemnified has received first information of the insolvency of the debtor," and in another section, that the assured shall furnish a complete statement of the whole claim within thirty days from the expiration of the policy, is not complied with, where only the reports of insolvency are furnished, since they do not furnish the information desired where the aggregate claim is asked for. p. 31.

From Superior Court of Marion County (77,581); *Vinson Carter*, Judge.

Action by the Gem Garment Company (Edwin H. Shedd, as receiver thereof being substituted as appellant), against the American Credit Indemnity Company of New York. From a judgment for defendant, plaintiff appeals. *Affirmed.*

Charles R. Willson and *Romney L. Willson*, for appellant.
Brown & Kepperley, for appellee.

ADAMS, J.—This action was instituted by the Gem Garment Company against appellee, on an insurance policy or indemnity bond, by the terms of which said Gem Garment Company claimed there was due to it the sum of \$2,392.95, net losses suffered on account of the insolvency of certain of its customers. The Gem Garment Company, since submission, passed into the hands of a receiver, and Edwin H. Shedd, as receiver of the Gem Garment Company, was, by order of the court, substituted as appellant herein.

The amended complaint is in one paragraph, and alleges that the Gem Garment Company (designated herein as appellant), is an Indiana corporation, with its chief place of business in the city of Indianapolis; that appellee is a New York corporation, doing business in the State of Indiana, in accordance with the laws regulating foreign insurance companies, and engaged in writing credit insurance; that on December 5, 1906, in consideration of \$300, premium paid by appellant, appellee executed and delivered to appellant a policy of insurance, which guaranteed appellant against certain actual losses that might be sustained on account of the insolvency of its customers for one year from February 1, 1907 (a copy of such policy being attached to and made a part of the complaint); that during the term of the policy appellant suffered a large loss on account of the insolvency of certain of its customers (setting out said loss in detail, and aggregating the amount of the demand); that appellant has performed all the terms and conditions of said policy on its part to be performed, except as provided in clause five of said policy, which is as follows:

“Final settlement of claim. If any claim for excess loss is made under this bond, a final statement of the claim, duly sworn to, shall be made by the indemnified in the manner prescribed by this company, and upon blank forms which will be furnished upon application, and such final statement must be received by this company at its office, Broadway and Locust street, St. Louis, Missouri, within thirty days after the expiration of this bond; otherwise there shall be no liability under this bond. The adjustment shall be had within sixty days, after the receipt by this company of such final statement, and the amount ascertained to be due on covered proved losses shall at once become payable.”

The complaint then avers that during the term of the policy, appellant had, in compliance with the provisions thereof, notified appellee on the blanks furnished by it, of the insolvency of each of its debtors, and of the amount that each owed appellant, and that at the expiration of

said policy appellee had full notice of the losses so sustained by appellant; that appellee, for a number of years prior to the execution of the policy sued on, had written credit indemnity insurance for appellant, and during such years appellee always, within thirty days from the expiration of each of said policies, by an authorized agent came to appellant and prescribed the manner in which it should make out its claims under such policies for the year then expired.

The complaint also avers that, after the execution of the policy in suit, appellant, relying upon the terms of said clause five, and of the custom of appellee in prescribing the manner of making final statement, expected to receive instructions from appellee for making out its final statement of claim as provided in said clause, and delayed preparing such statement until it should receive such instructions; that appellee did not communicate with appellant, nor give any instructions, nor prescribe any manner in which appellant should make such statement of claim, although appellee knew that appellant had sustained losses covered by said policy; that because of such failure to prescribe the manner of making final statement, and relying upon the terms of said clause five that appellee would so prescribe the manner of making such statement of claim, appellant did not make out such statement during the thirty days, as provided in said clause five.

It is further averred that appellant, in expectation of hearing from appellee, delayed taking any steps in making out its said claim until nine weeks after the expiration of the policy; that appellant then wrote to appellee in regard to it, but received no answer; that six days later it wrote again, and ten days later received from appellee a letter, wherein appellee denied its liability under said policy, for the reason that appellant had not filed its final statement of claim within the time provided for in said policy.

The bond, which is set out and made a part of the com-

plaint, provides that an initial loss shall be borne by the indemnified, and shall be eight-tenths of one per cent of the total amount of gross sales made by indemnified during the term of the bond, but said percentage shall be computed on sales of not less than \$200,000, and said initial loss shall be deducted from the aggregate amount of the net covered, proved losses, ascertained in the adjustment.

The policy or bond is made subject to a number of other provisions. The first defines the class of debtors who shall be deemed to be insolvent for the purposes of the bond; the second relates to the credit ratings of such insolvent debtors, and limits the recovery of a certain per cent of the gross loss. Clause three is in part as follows:

“Notification of insolvency. Notification of each insolvency under this bond must be given by the indemnified to this company on blanks supplied by this company for that purpose, and must be received by this company at its office Broadway and Locust streets, St. Louis, Missouri, during the term of this bond, and within twenty days after the indemnified has received first information of the insolvency of the debtor; otherwise the loss shall not be included in the adjustment.”

Clause four requires the indemnified to use diligence in procuring the largest possible amounts from insolvents. Clause six relates to the amount to be deducted in the adjustment from each gross loss. Other provisions in the policy provide, in detail, the manner of handling insolvent estates, but do not affect the question presented by this appeal.

Appellee demurred to the amended complaint, for the reason that it did not state facts sufficient to constitute a cause of action, which demurrer was sustained by the court. Appellant electing to abide by its amended complaint and exception to the ruling of the court in sustaining the demurrer thereto, final judgment was rendered in favor of appellee. Appellant has assigned as error the sustaining

of appellee's demurrer to the amended complaint, and this constitutes the only question presented by the record and briefs.

It will be noted that the complaint admits a failure on the part of appellant to make out a final statement of its claim for excess loss within thirty days after the

1. expiration of the bond, as provided in clause five.

Failure to make the statement, as required by the contract, would defeat a recovery in this case, and the complaint, disclosing such failure, would be bad on demurrer, unless the other facts averred therein are sufficient to constitute a waiver of this provision in the bond.

The contract required appellant to make a final statement of claim for excess loss, which is understood to mean any

loss over a minimum of \$1,600, the exact amount to

2. be determined upon the entire sales made by appellant during the term covered by the policy. This statement was to be in the possession of appellee within thirty days after the expiration of the policy; otherwise there would be no liability. This provision in the policy is plain and unambiguous, and it is binding upon the parties, unless waived by appellee in the manner averred in the complaint.

In passing upon a contract of this general class, courts will construe it most strongly against the insurer, and will

indulge all reasonable presumptions against a for-

3. feiture, but courts will not make a new contract for the parties; and in this case, if the contract of indemnity sued on is consistent in all its parts, free from uncertainty, and there has been no waiver and no fraud, it follows that the rights of the parties must be determined according to the terms of their written agreement.

Waiver has been defined as the intentional relinquishment of a known right, or such conduct as warrants an in-

4. ference of relinquishment of such right; an election by one to dispense with something of value or to forego

some advantage he might have taken or insisted upon. 29 Am. and Eng. Ency. Law (2d ed.) 1091; *Bucklen v. Johnson* (1898), 19 Ind. App. 406; *Warren v. Crane* (1883), 50 Mich. 301, 15 N. W. 465; *Fraser v. Aetna Life Ins. Co.* (1902), 114 Wis. 510, 90 N. W. 476; *Virginia, etc., Ins. Co. v. Aiken* (1886), 82 Va. 424.

In Bishop, Contracts (2d ed.) §792, the author says: "Waiver is where one in possession of any right, whether conferred by law or by contract, and with full knowledge of material facts, does or forbears the doing of something inconsistent with the existence of the right or of his intention to rely upon it; thereupon he is said to have waived it, and he is precluded from claiming anything by reason of it afterwards."

Measured by these definitions, we find nothing in the complaint establishing directly or inferentially an intention on the part of appellee to waive any provision in the contract. It is true, the complaint avers that appellant had for a number of years been a policy-holder in appellee company, and always during such years, and within thirty days after the expiration of appellant's policies, an authorized agent of appellee came to appellant, and prescribed the manner in which its claim against the appellee should be made out; that, relying upon the terms of clause five, and the custom of appellee, appellant delayed taking any steps toward making out its final statement until nine weeks after the expiration of the policy in suit. If the purpose of these averments is to establish an estoppel or a constructive waiver, we think it fails, for the reason that the action of appellee, through its agent, relates not to the contract in suit, but to former contracts between the same parties. It is elemental that where a party seeks to be relieved from the obligations of a contract by showing a waiver, either express or constructive, by the other party, he must show that such waiver was exercised with reference to the contract forming the basis of the action, and, to be

Shedd v. American Credit, etc., Co.—48 Ind. App. 23.

available, the acts relied upon as constituting the waiver must be subsequent to the written contract, and have been done with intent to waive some provision of the contract. *United Firemen's Ins. Co. v. Thomas* (1897), 82 Fed. 406, 27 C. C. A. 42, 47 L. R. A. 450; *Havens v. Home Ins. Co.* (1887), 111 Ind. 90, 94, 60 Am. Rep. 689; *Walton v. Agricultural Ins. Co.* (1889), 116 N. Y. 317, 22 N. E. 443, 5 L. R. A. 677; *Franklin Life Ins. Co. v. Sefton* (1876), 53 Ind. 380, 388.

Nor does it aid appellant to characterize as a custom the assistance given by the agent of appellee, in making out final statements under former contracts. Proof of a
6. custom will not be heard, when in direct conflict with the express terms of a contract sought to be avoided. *Atkinson v. Allen* (1868), 29 Ind. 375; *Clem v. Martin* (1870), 34 Ind. 341; *Franklin Life Ins. Co. v. Sefton*, *supra*.

Moreover, in this case, the custom alleged was with reference to other policies, the nature, terms and obligations of which are not shown in the complaint, and it does
5. not appear that the agent on such former occasions did not come in response to an application for the blank forms upon which the final statement is required to be made.

It appears from the complaint that appellant did nothing in the way of making the proof of loss as required, until five
weeks after the thirty days given to make said proof
7. had passed. By clause five of the contract, it was provided that where there was any claim for excess loss, the final statement thereof should be made by the indemnified in the manner prescribed by the company, and upon the blank forms which the company would furnish upon application, and it was expressly provided that no liability would arise in the event that such final statement was not received by appellee within thirty days after the expiration of the policy.

The appellant insists that, under the terms of the pro-

vision heretofore quoted, it was incumbent upon appellee to prescribe the manner of making the final statement, and that this was a duty enjoined upon appellee under the contract, as the initial step in the settlement. We do not so read the clause herein set out. While the final statement is to be made in the manner prescribed by the company, it is to be made upon the blank forms which the company agrees to furnish upon application. Clearly then, as the first step, the indemnified must apply to the company for the blank forms, for no final statement could be made except upon such forms, and there was no obligation upon appellee to furnish forms, except upon application. Indeed, we fail to understand how appellee could have any notice of excess loss, in the absence of some information from appellant, at the expiration of the policy, that such a loss had been sustained.

It is, however, urged by appellant that appellee, at the expiration of the year, had full notice of the losses, having been notified, as provided in clause three, of each loss with-

8. in twenty days after receiving the first information of insolvency. Manifestly, clause three was not intended to supply the final statement contemplated by clause five, but was intended to give the indemnity company notice of the gross loss, and the name and residence of each insolvent. The contract in this case provided that an initial loss of eight-tenths of one per cent of the entire sales made during the term of the policy was to be borne by the indemnified, and this initial loss was not to be less than \$1,600, the actual amount to be determined upon the entire sales of the year. The amount of such sales could not be ascertained until the close of the year. The current notices of insolvency advised appellee of the amount of appellant's claim against each insolvent; but to assume that the loss in each case was total, would be wholly unwarranted. The notice contemplated by clause three was not intended to furnish data from which appellee could ascertain the ex-

tent of its liability. In the absence of the final statement appellee could not know the amount of the initial loss, or that the loss for which it was liable was in any sum in excess of the initial loss. The agreement of the parties provided that should there be any claim for excess loss, a final statement thereof, duly sworn to, should be made by the indemnified in the manner prescribed by appellee, and upon blank forms to be furnished upon application. While it is incumbent upon appellee to prescribe the manner of making the final statement, where an excess loss is claimed, it is the duty of appellant to advise appellee of such claims, and apply for the forms upon which to make the final statement. The complaint fails to show that this requirement was waived, and the demurrer was properly sustained.

Judgment affirmed.

POLK v. HAWORTH.

[No. 7,258. Filed June 7, 1911.]

1. **PRINCIPAL AND AGENT.—*Failing to Disclose Relationship.—Liability.—Railroads.***—An agent who contracts as an individual and who fails to disclose that he is the agent of a railway company, is liable as a principal. p. 34.
2. **PRINCIPAL AND AGENT.—*Contracts.—Railroads.—Interrogatories.—Instructions.***—In an action by a landowner against defendant on his contract to pay any damages caused by the construction of an interurban railroad through her land, interrogatories as to who constructed the railroad, and instructions drawn upon the theory that defendant was merely an officer of the company and would not be personally liable, are properly refused, the jury having been instructed that the plaintiff could not recover unless she proved that defendant executed the contract in his individual capacity. p. 35.
3. **EMINENT DOMAIN.—*Railroads.—Damages.—Life Estates.—Remainders.—Instructions.***—In condemning land for a railroad right of way, both the owner of the life estate and the owner of the remainder in fee simple are entitled to damages; and an instruction in an action by the owner of the life estate, that she was not entitled to recover, was properly refused. p. 36.

Polk v. Haworth—48 Ind. App. 32.

4. APPEAL.—*Harmless Error.—Admission of Improper Evidence.*—The admission of improper evidence over objection is harmless, where other uncontradicted evidence of the same character was introduced without objection. p. 36.

From Johnson Circuit Court; *William A. Johnson*, Special Judge.

Action by Nancy J. Haworth against James T. Polk. From a judgment for plaintiff, defendant appeals. *Affirmed.*

L. E. Slack, for appellant.

Douglas Dobbins and *E. A. McAlpin*, for appellee.

IBACH, J.—Appellee, in her complaint, alleged in substance that in 1902 she entered into a contract with appellant, by the terms of which she agreed to permit him and others whom he might authorize, to enter upon her premises and make a railroad cut and grade in front of her residence; that, as a part of said agreement, appellant agreed to pay appellee all damages her property might sustain by the construction of such cut and grade; that thereafter appellant, with teams and laborers, entered upon said premises and constructed such cut and grade. The damages to her property are described in detail, and are alleged to have amounted to \$2,000, for which amount she asked judgment.

After the overruling of a demurrer for want of facts, the case was put at issue by answer in general denial. A jury trial resulted in a verdict of \$400 for appellee, appellant's motion for a new trial was overruled, and judgment was rendered on the verdict, from which judgment this appeal is prosecuted.

The errors relied upon for reversal arise upon the overruling of the motion for a new trial, and present three contentions: (1) That the contract was made with and the work done by the Indianapolis, Greenwood and Shelbyville Railway Company, of which appellant is but an officer, and

therefore not personally liable; (2) that appellee was not the owner in fee simple of the premises damaged, and therefore could not recover; (3) that certain evidence was wrongfully admitted.

Appellant claims that the evidence does not establish the allegations of the complaint, and does not show that

1. he made an individual contract with appellee, but rather that appellee made the agreement with the railway company through its officers.

If appellant at the time of making the agreement with appellee was acting merely as agent of the interurban railway company, it was his duty, in order to avoid personal liability, to declare to appellee the fact of his agency. Failing to do so, he took upon himself all the liabilities, either express or implied, created by the contract, exactly in the same manner as if he were the principal in interest. *Merrill v. Wilson* (1885), 6 Ind. 426; 1 Am. and Eng. Ency. Law (2d ed) 1122; Reinhard, Agency §303.

In the present case there is evidence that appellant made the contract sued on; that if he made it as agent he did not disclose his agency; and there is no evidence that appellee knew of any agency of appellant at the time the agreement was made. It may not have been intentional on the part of appellant to bind himself to the payment of damages to appellee, but failing to inform her of his agency, and she having no actual knowledge of that fact, under the well-known rule of law, he cannot now escape liability and be relieved of the burden of his own contract by claiming that he was in fact acting for the railway corporation. If he had made known such fact to appellee she might not have entered into such a contract with the railroad company; as, for example, she might have been willing to accept appellant for the performance of such contract, knowing him to be responsible, while she would not have been willing to enter into a similar contract with the railroad company, not being acquainted

with its financial responsibility. The evidence sufficiently bears out the allegations of the complaint.

Appellant asked that certain interrogatories be propounded to the jury, which proceed on the theory that appellant is not liable if the work was done by the rail-

2. way company and under its orders. They were rightly refused, as under the allegations of the complaint it is immaterial who did the work, so long as it was authorized by appellant. And if all the interrogatories presented had been answered in the affirmative, these answers would not have availed appellant, as the fact would still remain fully proved that the agreement sued on was made personally with appellant and in his individual capacity, and not as agent for any one, so that it mattered not who performed the actual labor contemplated in the agreement made with appellee.

Error is also assigned in refusing to give certain instruction requested by appellant. The condition of the record is not entirely satisfactory, but we should be unduly technical to hold that the instructions were not in the record, and were not to be considered.

Certain of these proceed upon the same theory upon which the interrogatories were drawn—that the work was done by the railway company, of which appellant was but an officer. For reasons already given, these were rightly refused, and for the further reason that the court had already instructed the jury that plaintiff could not recover unless she proved that appellant made and entered into the contract with her in his individual capacity.

Instruction two, requested by appellant, was wrong, and was therefore properly refused. If given, the court would have told the jury that appellee could not recover any damages unless she owned in fee simple the real estate damaged.

The owner of a life estate, as well as the remainderman,

is entitled to damages for injuries done to his estate. The same act may be injurious to both, and they are en-

3. titled to recover in separate actions for their several damages, the holder of the life estate for damages on account of loss to the present enjoyment of the estate, and the remainderman for the more permanent injury to the property. The amount of loss sustained might not be the same, but the legal right to redress is the same.

It will be observed that appellee did not aver the nature of her title to the land in question, and the cause proceeded to trial without requiring the nature of her title to be disclosed. And although counsel in his brief claims that the proof shows only a life estate in appellee, yet the instruction would have been erroneous, because it would tend to deprive her of all relief for injuries she might have suffered to her use, possession and enjoyment of the land.

Error is assigned in the admission of certain evidence; but whether properly admitted or not, the error is

4. not available, since other uncontradicted evidence of the same character and to the same effect was introduced without objection.

No error appearing in the record, the judgment is affirmed.

SCHRADER ET AL. v. MEYER ET AL.

[No. 6,878. Filed June 8, 1911.]

1. APPEAL.—*Assignments of Errors.*—The assignment of errors constitutes the appellants' complaint on appeal. p. 37.
2. APPEAL.—*Rules.*—The purpose of Appellate Court rules in relation to the preparation of briefs, is to enable the several judges to determine the merits of the appeal without the delay of examining the record. p. 37.
3. APPEAL.—*Rules.*—*Briefs.*—Where appellants, in their brief, fail (1) to set out any errors relied upon, (2) to set out the motion for a new trial relied upon, or to state its grounds, (3) to set out the complaint or the substance thereof, (4) to set out the

Schrader v. Meyer—48 Ind. App. 36.

demurrer to the complaint, or to state the grounds thereof, and (5) to give a summary of the evidence, no question is presented. p. 38.

From Superior Court of Tippecanoe County; *Henry H. Vinton*, Judge.

Action by Alice Meyer, individually, and as guardian of Edith Schrader and others, against John Schrader and others. From a judgment for the plaintiff, as guardian, defendants appeal. *Affirmed.*

Wilson & Quinn, for appellants.

Edgar D. Randolph and *Edgar G. Collins*, for appellees.

FELT, J.—This is an appeal from the Superior Court of Tippecanoe County from a judgment of \$690 in favor of Alice Meyer, as guardian of Edith and Henry Schrader, minor heirs of William Schrader, deceased.

The appellants in the preparation of their brief have failed to comply with rule twenty-two of this court in the following particulars: (1) The errors assigned are not set out or shown in any way; (2) the motion for a new trial relied upon is not set out or its grounds stated; (3) neither the complaint nor the substance thereof is shown; (4) the cause of the demurrer is not stated; (5) there is no condensed recital of the evidence in narrative form.

The rules require that "the errors relied upon for a reversal" be shown in appellant's brief; but here there is not only a failure to set out the errors assigned, but there is not so much as a reference by page or line to the record where they may be found.

The assignment of errors in appellate procedure bears the same relation to the appeal that the complaint

1. bears to the original suit, and when not shown in the brief, the errors, if any, are not available. The primary purpose of the rules is to expedite the business of the court, and the briefs, properly prepared,
2. enable the judges, other than the one to whom the

record has been distributed, to become familiar with the merits of the questions presented on appeal.

In the absence of briefs that comply with the rules, the questions cannot be decided, unless the judges do that which the rules require of the attorneys, and if this is done

3. by them, it results in placing a hardship upon the litigants whose cases must wait while time is thus unnecessarily consumed.

These rules have been so long promulgated and so frequently passed upon by the courts that little excuse can be found for failing substantially to comply with them. In this case the failure is of such a character that to attempt to ascertain and decide the questions presented would be to abrogate the rules, and this we cannot do. *Chicago, etc., R. Co. v. Newkirk* (1911), *post*, 349; *Buehner Chair Co. v. Feulner* (1905), 164 Ind. 368; *Howard v. Adkins* (1906), 167 Ind. 184; *Indianapolis St. R. Co. v. Marschke* (1906), 166 Ind. 490; *Miller v. Collier* (1905), 35 Ind. App. 176; *Indiana Union Traction Co. v. Heller* (1909), 44 Ind. App. 385; *State v. Lukins* (1909), 43 Ind. App. 341; *Inland Steel Co. v. Smith* (1907), 39 Ind. App. 636.

Judgment affirmed.

CITY OF INDIANAPOLIS v. SLIDER.

[No. 7,265. Filed June 8, 1911.]

1. MUNICIPAL CORPORATIONS.—*Liability for Negligence*.—Cities have no statutory liability for defects and dangers in streets, but they are liable for negligence in the maintenance thereof. p. 41.
2. NEGLIGENCE.—*Proximate Cause*.—Negligence to be actionable must be the proximate cause of the injury complained of. p. 41.
3. NEGLIGENCE.—*Proximate Cause*.—*Definition*.—The proximate cause of an injury is that cause which in a natural and continuous sequence, unbroken by any new, independent cause, produces the injury, and without which the injury would not have happened. p. 42.

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4. **DAMAGES.—Negligence.**—The damages recoverable in a negligence case are those which flow proximately from the negligence alleged. pp. 42, 43.
5. **PLEADING.—Certainty.—Complaint.**—The same certainty in a complaint is required by the code, as by the common law; and a plaintiff will be presumed to state his cause of action as strongly as the facts warrant. p. 42.
6. **MUNICIPAL CORPORATIONS.—Streets.—Dead Trees.—Negligence.—Complaint.**—A complaint alleging that defendant city “authorized, permitted, and negligently allowed a dead, rotten and decayed tree to stand * * * between the sidewalk and the roadway of said [Pennsylvania] street * * * four weeks after it had notice of its dangerous condition * * * without placing around it, or at it, any safeguards or railings to give notice of its dangerous character * * *; that the plaintiff * * * was lawfully walking upon said sidewalk, and without any notice of the dead, rotten and decayed character of said tree, or its dangerous nature * * * and in the use of all due care, when said dead, rotten and decayed tree fell with great force and violence upon” her, to her damage, is bad, since it fails to show that the tree fell because it was dead, rotten and decayed. p. 42.
7. **NEGLIGENCE.—Complaint.**—A complaint for negligence is bad where it fails to connect the injury with the negligence. p. 43.

From Superior Court of Marion County (73,017); *James M. Leathers*, Judge.

Action by Ida Slider against the City of Indianapolis. From a judgment on a verdict for the plaintiff for \$1,200, defendant appeals. *Reversed*.

Frederick E. Matson, James D. Peirce and Crate D. Bowen, for appellant.

George Burkhart, for appellee.

ADAMS, J.—Appellee recovered judgment against appellant for damages growing out of injuries alleged to have been received by the falling of a dead and decayed tree, located within the limits of a street of the appellant city.

The complaint, as originally filed, was in three paragraphs. A demurrer was sustained to the second and third paragraphs, and overruled as to the first. Upon motion of appellee, and by leave of court, the first paragraph of

complaint was amended, to which paragraph, as amended, appellant demurred for want of facts sufficient to constitute a cause of action, which demurrer was overruled, and the cause put at issue by answer in general denial. Upon the issue thus formed, the cause was submitted to a jury, and a verdict returned for appellee. Motion for a new trial was overruled, and judgment rendered upon the verdict.

The sufficiency of the complaint to withstand a demurrer for want of facts is the first and controlling question presented by the assignment of errors.

The amended complaint, omitting the caption and conclusion, is as follows: "That the city of Indianapolis is a municipal corporation, incorporated under the laws of the State of Indiana; that North Pennsylvania street is one of the public streets within the corporate limits of said city; that it is the duty of said city to keep its streets and sidewalks in a safe condition for travel. Yet said city, in violation of said duty, as aforesaid, authorized, permitted and negligently allowed a dead, rotten and decayed tree to stand near the sidewalk on the east side of said street, between Vermont and East New York streets, and between the sidewalk and the roadway of said street; that defendant city negligently allowed, permitted and authorized said dead, decayed and rotten tree so to stand and remain near said sidewalk for a long period of time, to wit, four weeks, after it had notice of its dangerous condition, or by the exercise of reasonable care could have known of its dangerous condition; that said defendant city could, by the exercise of reasonable diligence, have removed said tree within said period of four weeks; that said defendant, with full knowledge of the dangerous nature of said tree, negligently and carelessly allowed it so to stand, without placing around it, or at it, any safeguards or railings to give notice of its dangerous character, and to prevent persons who might walk upon said sidewalk from being damaged or injured;

that defendants knew, or by the exercise of reasonable care could have known, of the dead, decayed and rotten character of said tree; that plaintiff, on October 8, 1906, as aforesaid, was lawfully walking upon said sidewalk, and without any notice of the dead, rotten and decayed character of said tree, or its dangerous nature, and without negligence, and in the use of all due care, when said dead, rotten and decayed tree fell with great force and violence upon this plaintiff, by reason whereof plaintiff was injured in this, to wit, she was knocked unconscious, her back was torn, lacerated and bruised, the ligaments of her back were torn, wrenched and permanently injured, her nervous system was shocked and permanently injured, she suffered other serious and permanent injuries, and she suffered great pain and mental anguish, and at all times continues to suffer great pain and mental anguish, all on account of which she was confined to her bed many weeks, and was compelled to expend large sums of money for doctor bills and nurse hire, and was prevented from working for a long time; that she has suffered and continues to suffer great pain and mental anguish on account of said injuries.”

There is no statutory liability in this State against cities for injuries growing out of defects and dangers in public streets. Cities are, however, required to respond in

1. damages to one injured in such public place, but where a liability is claimed, it must be predicated upon negligence imputed to the city for failure to keep its streets in safe condition for travel. *Grove v. City of Fort Wayne* (1874), 45 Ind. 429, 15 Am. Rep. 262.

Negligence of any kind, to furnish the foundation of an action for damages, must be the proximate cause of

2. the injury complained of, the maxim of the law being *causa proxima, non remota, spectatur*. 1 Thompson, Negligence (2d ed.) §44.

Proximate cause must be taken to mean that which in a

natural and continuous sequence, unbroken by any
 3. new, independent cause, produces the event, and without which the event would not have occurred.
 1 Shearman & Redfield, Negligence (5th ed.) §26.

“It is an undisputed rule of law in cases of this kind that recoverable damages are confined to those which flow from damages that are traceable directly and proximately to the negligence of the defendant.” *P. H. & F. M. Roots Co. v. Meeker* (1905), 165 Ind. 132, 136. See, also, *Sirk v. Marion St. R. Co.* (1895), 11 Ind. App. 680, 682; *Indianapolis St. R. Co. v. Ray* (1906), 167 Ind. 236.

The rule of pleading at common law is that the facts must be set forth with certainty, by which is meant a clear and distinct statement of the facts which constitute the
 5. cause of action or the ground of defense; and, by the repeated decisions of this State, the same degree of certainty in pleading is required under the code as at common law. A plaintiff will be presumed to state his case as strongly as the facts warrant, and courts are not justified in resorting to inferences, where the question involved pertains to the sufficiency of the pleading. The material facts necessary to constitute a cause of action must be directly averred, and cannot be left to depend upon or to be shown by mere recitals or inferences. *McElwaine-Richards Co. v. Wall* (1902), 159 Ind. 557; *Southern R. Co. v. Sittasen* (1906), 166 Ind. 257; *Erwin v. Central Union Tel. Co.* (1897), 148 Ind. 365; *Baltimore, etc., R. Co. v. Young* (1896), 146 Ind. 374, 377; *Avery v. Dougherty* (1885), 102 Ind. 443, 449; *Ohio, etc., R. Co. v. Engrer* (1892), 4 Ind. App. 261, 263; *Peerless Stone Co. v. Wray* (1894), 10 Ind. App. 324, 325.

In the complaint before us, the negligence of appellant in permitting a dead and decayed tree to stand in a
 6. public thoroughfare is sufficiently shown by direct averments. The injury to appellee, caused by the

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falling of the tree and the damages resulting, is likewise shown by direct averments. But it does not appear from any averment in the complaint that the tree fell by reason of its dead and decayed condition, and no causal connection is disclosed between the negligence charged and the injury suffered. The negligence of appellant is not averred to have been the direct and proximate cause of the injury to appellee.

It is the settled law of this State that where an action for damages is founded upon negligence, the negligent acts must be the direct and proximate cause of the injury, and where the complaint fails to connect the negligence with the injury, it will be held bad on demurrer for want of sufficient facts. *City of Logansport v.*

7. *Kihm* (1902), 159 Ind. 68; *Pittsburgh, etc., R. Co. v. Conn* (1885), 104 Ind. 64, 68; *Corporation of Bluffton v. Mathews* (1883), 92 Ind. 213, 216; *Pennsylvania Co. v. Hensil* (1880), 70 Ind. 569, 574, 36 Am. Rep. 188; *Pennsylvania Co. v. Gallentine* (1881), 77 Ind. 322, 325; *City of Greencastle v. Martin* (1881), 74 Ind. 449, 457.

Upon the authority of the foregoing cases, we are compelled to hold that the complaint before us does not state facts sufficient to constitute a cause of action, and that the trial court erred in overruling the demurrer thereto.

The judgment is therefore reversed, with instructions to the trial court to sustain the demurrer to the complaint, with leave to amend.

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[No. 6,983. Filed June 9, 1911.]

1. **APPEAL.—Failure to Present Questions.—Assignment of Errors.**
—The failure of the appellant to question the sufficiency of an answer in his assignment of errors is fatal to the raising of any question thereon. p. 46.
2. **APPEAL.—Answer.—Special Findings.—Conclusions of Law.**
Where the special findings show the same facts as are set out

in an answer, the question of the sufficiency of the answer is unimportant, the exceptions to the conclusions of law raising the same questions. p. 46.

3. **BILLS AND NOTES.—Payable in Bank.—Pleading and Proof.**—In an action on a note payable in bank, it is not necessary that the holder should plead and prove that the note was duly presented for payment at maturity, at such bank, but the maker may show that he was prepared to pay at such time and place, thereby avoiding any penalty for nonpayment. p. 50.
4. **BILLS AND NOTES.—Payable in Bank.—Payment by Deposit.—Agency.**—A note payable in bank is not discharged by the mere deposit in such bank of sufficient money to pay it, since the bank is not the holder's agent for receiving payment unless such holder has deposited such note in such bank for collection. p. 50.
5. **BILLS AND NOTES.—Mortgages.—Maturity.—Default of One Note of Series.—Penalties.**—A provision in a mortgage that the failure of the maker of a series of notes secured by the mortgage to pay each note at its maturity shall cause the remaining ones to become due, is not in the nature of a penalty, nor a forfeiture. p. 51.
6. **MORTGAGES.—Default in Payment.—Equitable Relief.**—Where a mortgagor defaults in the payment of one of a series of notes, thereby causing the entire debt to become due, equity will refuse relief, except for good cause shown. p. 51.
7. **BANKS.—Deposits.—Using for Payment of Note Payable at Bank.**—The deposit for collection of a note payable in bank authorizes such bank to apply the maker's general deposit in the payment thereof; and a failure to present the note at such bank for payment, when the maker has deposited money for its payment, relieves the maker of further interest or costs. p. 51.
8. **MORTGAGES.—Failure to Pay.—Excuses.—Inequitable Misconduct of Mortgagee.**—Where a mortgagee's inequitable, but not necessarily fraudulent misconduct is the cause of the mortgagor's failure to pay a note at its maturity, equity will not permit the foreclosure of the mortgage, provided the mortgagor is ready to pay the note. pp. 52, 55.
9. **BILLS AND NOTES.—Default.—Deposits in Bank.—Foreclosure for Entire Debt.—Tender.**—Where the maker of a series of notes had money on deposit with which to pay the one to become due, the payee's failure to present it, and his avoidance of the maker, in order that the provision in the mortgage might take effect, making the entire debt due upon default in the payment of any note at its maturity, will preclude his enforcement of such provision, the maker having made a tender in court of the sum due. pp. 54, 55.

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10. FRAUD.—*Question of.—Inferences.*—Fraud, when relied on as a cause of action, or as a defense, must be found as a fact, and not be left merely to inference. p. 55.
11. APPEAL.—*Weighing Evidence.*—Where there is some evidence tending to sustain the facts found, the trial court's decision will not be disturbed for a want of evidence. p. 55.

From Boone Circuit Court; *Samuel R. Artman*, Judge.

Suit by Justus Kerbaugh against Thomas Nugent and another. From a judgment for plaintiff, he appeals. *Affirmed.*

William J. Darnell, George R. Darnell and Samuel M. Ralston, for appellant.

Terhune & Adney, for appellees.

HOTTEL, J.—Suit by appellant against appellees on four promissory notes of \$1,000 each, and to foreclose a mortgage given to secure them.

The mortgage contains the following provision: "Upon the failure to pay any one of said notes at maturity, all said notes are to become due and collectible." An alleged default in this provision gives rise to this suit.

The complaint is in one paragraph, and contains the customary averments of a complaint on a series of notes and for the foreclosure of a mortgage given to secure them, with the added averments that the mortgage in suit contained the provision before quoted, and that appellees failed to pay the first note at maturity. An affirmative answer in one paragraph was filed, to which there was a reply in general denial. On the issues thus formed there was a trial by the court, with a special finding of facts and conclusions of law, to each of which appellant at the time excepted. Appellant filed a motion for a new trial, which was overruled and exceptions saved. Thereupon the court rendered judgment for appellant in the sum of \$1,248, and for appellees for costs, and that appellant "take nothing by his suit on foreclosure of the mortgage herein."

The errors assigned and relied upon by appellant are that the court erred in its first and second conclusions of law, and in overruling appellant's motion for a new trial.

The answer filed by appellees admits the execution of the note and mortgage sued on, but avers affirmative facts in the

way of present ability and readiness to pay at the

1. time and place fixed in the notes, and a tender, before suit, of the amount due on the first note and in-

terest on the others. The averments of this answer, upon the questions involved, are substantially the same as the facts found by the court in its special finding of facts, hereafter set out; and as no question as to the sufficiency of this answer is presented to this court by any assignment of error, we deem it unnecessary to extend this opinion by a copy thereof. In this connection, however, it should be observed that appellant's counsel are now insisting that the answer filed was only in abatement, and was not in bar of the action, and that it is bad because it purports to answer the entire complaint, and in fact answers but a part. But the insufficiency of this answer is not presented to this court by

any assignment of error, and the finding of facts be-

2. ing in substance the same as the averments of the answer, the same question arises on the exceptions to the conclusions of law on the facts specially found, and in such case the sufficiency of the pleading is not important. *Scanlin v. Stewart* (1894), 138 Ind. 574, 575; *Woodward v. Mitchell* (1905), 140 Ind. 406-408; *Smith v. Wells Mfg. Co.* (1897), 148 Ind. 333; *Lake Erie, etc., R. Co. v. Hoff* (1900), 25 Ind. App. 239.

A correct understanding of the questions presented by the appeal necessitates a statement of the substance of the special finding of facts and the conclusions of law thereon. The findings, after setting forth all the facts with reference to the ownership by appellant of certain flouring mill property in Boone county, its description and sale to appellees, the execution by appellees of the notes in suit in payment there-

for, the execution of the mortgage in suit given to secure them, and a copy in full of the notes and the mortgage, which copy contains the provision heretofore set out in this opinion, then proceeds, in substance, as follows: That said notes, with the accrued interest thereon, amount to \$4,274.66, and a reasonable attorney's fee for their collection is \$250; that by the terms of said notes they were all payable at "The Citizens State Bank at Jamestown, Indiana;" that said note falling due on February 25, 1908, was at no time deposited at said bank; that appellant was absent from the town of Jamestown during all of said day, and until after 10 o'clock that night; that on said day appellees had upon general deposit in said bank, subject to check, over \$1,250, being more than enough to pay the note falling due on said day, with accrued interest thereon, and one year's interest upon each of the other three notes; that appellees on said day, prior thereto and since that day, have resided in the city of Washington, Daviess county, Indiana; that appellee Thomas Nugent at that time was conducting his milling business in the town of Jamestown by and through Henry Turner, his agent, which was well known to appellant on said day, and long prior thereto; that one week prior to said day said Turner, as the agent of appellees, in a personal conversation with appellant, ascertained when the first note would be due and the amount that would be due as principal and interest on said note, and the interest on the other three notes, but did not, at that time, learn that said notes were payable at said bank; that prior to said day appellee Thomas Nugent had notified said bank that so much of his general deposit in said bank as was necessary for that purpose was to be applied to the payment of appellant's note and interest, and, at the said time, arranged to secure additional money from said bank with which to conduct his business; that on said date said Turner, as agent of said appellee, ascertained the amount of money that said appellee then had on deposit in said bank, and informed the

officers of said bank that said appellee had sufficient money on deposit to pay the note and interest due to appellant, and that there would be a surplus; that said appellee's place of business was near said bank, and immediately across the street from appellant's residence; that during all of said day said Turner, as agent for said appellee, kept a look-out for appellant, in order to pay said note and interest, but was unable to find him; that said note was not presented at said bank for payment either on February 25, or February 26; that during February 26, 1908, appellant remained at his house practically all day, but was not seen by said Turner; that about 5 o'clock, on the evening of said 26th, appellant went to the office of a lawyer in said town of Jamestown and consulted him as to his rights in reference to said notes and mortgage; that on February 27, 1908, at about 11:30 o'clock a.m., appellant again went to the office of said lawyer, and in company with him went to said bank and presented the note that fell due February 25, 1908, and demanded payment thereof; that the officers of said bank, who had been informed by appellee Thomas Nugent and Henry Turner that the deposit of said appellee was to be applied to the payment of said note and interest, then informed said appellant that said appellee had sufficient money on deposit to pay the note presented; that they had no express authority to make payment, but that said appellee's agent, Henry Turner, was authorized to draw a check for the amount; that immediately after receiving said information appellant and his attorney left said bank, and appellant directed his attorney to institute suit upon said notes and to foreclose said mortgage; that said attorney left Jamestown on February 27, 1908, for the city of Lebanon to file suit on said notes; that upon appellant's return to his residence from the bank said Turner saw him, and told him that he desired to see him, but appellant excused himself, saying that he would see Mr. Turner after dinner; that about 12:45 o'clock p.m., on February 27, appellant went to ap-

appellee Thomas Nugent's place of business, immediately across the street from his residence, and saw said Turner, who informed appellant that he desired to pay the note due February 25, with the interest thereon, and one year's interest on each of the other notes, and asked appellant if he would accept the money; that appellant informed said Turner that he would not; that said Turner thereupon importuned said appellant to accept the money, and permit him to draw a check in payment of said note and interest, but appellant told said Turner that he would not accept the money or a check, that, under the provisions of the mortgage, the notes were all due, and that his attorney had left Jamestown for Lebanon to file a suit upon said notes, and to foreclose said mortgage. The findings also show that on the same day and prior to the filing of the answer herein, defendant paid to the clerk of the Boone Circuit Court, as a tender of the principal of said note and the interest thereon until that day, and one year's interest on each of the other notes, the sum of \$1,248 in standard gold coin of the United States, which sum is still in the hands of the clerk of this court as a tender to plaintiff in payment of the principal of said note and the interest thereon until the day of filing said answer and one year's interest on each of the other notes; that on February 25, 26 and 27, 1908, and during the whole of each of said days, appellee Thomas Nugent had on general deposit in said bank, subject to check, a sum of money in excess of \$1,250, and prior to said dates just mentioned the bank had been informed by said appellee that so much of said deposit as might be necessary to pay said first note and interest due on February 25, 1908, was to be applied to such payment; "that plaintiff failed to present said note due by date on February 25, 1908, to said bank on said day for payment, and remained away from Jamestown on said date to avoid said Henry Turner, and prevent payment on said day, with the wrongful and deliberate purpose and intent

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of making a default in the payment of said note and interest when due, in order to render all of said notes due, so as to authorize a suit thereon; and that defendant Rose Nugent is the wife of defendant Thomas Nugent.”

The court stated its conclusions of law upon the facts found, as follows: (1) “That plaintiff is entitled to a judgment against defendant Thomas Nugent for \$1,248, and an order upon the clerk of this court to apply the money in his hands as a tender to the payment of said judgment; (2) That each of the defendants is entitled to a judgment against the plaintiff for costs.”

In determining the controlling question presented by this appeal, appellant has in his favor the statute and certain general principles declared and recognized by the decisions of this court and the Supreme Court.,

(a) A note made payable at a particular time and place does not impose on the payee or his assignee the necessity of averring or proving a demand at the time and place
3. fixed by the note, but the maker may show a readiness to pay such demand at such time and place. §374 Burns 1908, §368 R. S. 1881; *Glatt v. Fortman* (1889), 120 Ind. 384; *Eaton, etc., R. Co. v. Hunt* (1863), 20 Ind. 457; *Brown v. McElroy* (1876), 52 Ind. 404, 406; *Dillingham v. Parks* (1902), 30 Ind. App. 61.

(b) It follows from the statement just made that the maker of a promissory note payable at a particular bank cannot discharge such obligation by depositing in such
4. bank the funds with which to pay said obligation, and that money so deposited in such bank cannot be deemed to be deposited with the payee’s agent, except, that in case the holder of such note deposits it at such bank for collection, he thereby constitutes such bank his agent for such purpose. *Glatt v. Fortman, supra*; *Wallace v. McConnell* (1839), 13 Pet. *136, 10 L. Ed. 95; *Dillingham v. Parks, supra*.

(c) Provisions in a mortgage of the kind here in ques-

tion are not in the nature of penalties or forfeitures, “but are to be regarded as agreements between the parties

5. fixing the time and conditions upon which the whole debt may become due.” *Moore v. Sargent* (1887), 112 Ind. 484; 1 Jones, Mortgages (6th ed.) §76.

(d) In such provisions time is of the essence of the contract, and a court of equity will not relieve the mort-

6. gator from a default, unless he can show some good excuse for it. *Moore v. Sargent, supra*; 2 Jones, Mortgages (6th ed.) §1179.

On the other hand, there are holdings that throw light upon this question from appellees’ viewpoint. Upon the subject of appellees’ conduct with reference to the default, and the effect of depositing the money at the place of payment, the courts of our own State and other states have expressed their opinions.

In the case of the *Bedford Bank v. Acoam* (1890), 125 Ind. 584, 587, 9 L. R. A. 560, 21 Am. St. 258, the court said:

“While we are not inclined to the view that a promissory note negotiable and payable at a bank in this State is, in all respects, the equivalent of a check drawn by the maker against a fund on deposit in the bank, so as to require the banker to pay the note on presentation out of funds applicable to that purpose, we can conceive of no valid reason why a note or bill thus drawn should not be held to authorize the banker to pay, and thereby become subrogated to all the rights of the holder to the same extent as if it had purchased the paper after maturity.”

In the case of *Wallace v. McConnell, supra*, at page *150, the court said: “And when a note or bill is made payable at a bank, as is generally the case, it is well known, that according to the usual course of business, the note or bill is lodged at the bank for collection; and if the maker or acceptor calls to take it up, when it falls due, it will be delivered to him, and the business is closed. But should he not find his note or bill at the bank, he can deposit his money, to meet the

note, when presented, and should he be afterwards prosecuted, he would be exonerated from all costs and damages, upon proving such tender and deposit.”

This court, in the case of *Dillingham v. Parks, supra*, at page 70, said: “Where the maker has no defense to the note and has money on general deposit at such bank, it may, in this State, in good faith, apply such funds in payment of the note upon the presentation thereof by the holder at maturity, and may set off the amount so paid against the demand of the maker for the money so on general deposit.

* * * The failure to make presentment at the bank does not relieve the maker from his promise to pay, but only relieves him from damages in case he is ready at the bank to pay, and there is no one there to receive the money. Such facts are regarded as equivalent to a tender of the sum payable; and an answer showing such tender and payment of the money due into court will bar a recovery of interest and costs, but will not bar the cause of action on the note.” To the same effect is the case of *Bedford Bank v. Acoam, supra*.

Concerning the causing of the default by the acts or conduct of the payee of the obligation, and the effect thereof, our own and other courts have expressed

8. themselves in the following cases. In *Moore v. Sargent, supra*, it was said: “If the default was induced by the fraudulent or inequitable conduct of the creditor, or by any agreement or promise upon which the debtor might rely which operated to mislead or throw the debtor off his guard, a court of equity would interfere to stay proceedings or the action might be abated upon the facts being properly pleaded.” In *Eaton, etc., R. Co. v. Hunt, supra*, it was said at page 468: “But if the maker on the trial proves that the money was at the place, ready to be applied in payment when the note fell due, he will not be subject to costs. *Indiana, etc., R. Co. v. Davis* [1863], 20 Ind. 6.” It was said in *Glatt v. Fortman, supra*, that “the readiness to pay at the place designated constitutes a defense, if properly fol-

lowed up.” In *Noyes v. Clark* (1838), 7 Paige (N. Y.) 179, 180, 32 Am. Dec. 620, it was said: “A court of equity, however, will not permit the mortgagee, or his assignee, to take an unconscientious advantage of the mortgagor who is willing to pay at the time prescribed but who is unable to do so in consequence of the act of the other party. * * *

In this case it is evident that the defendant Clark was both ready and willing to pay the interest on his bond and mortgage on the day it became due. And if the assignee did not intentionally deprive him of the power of doing so, by keeping out of the way and concealing his place of residence, he transacted the business of the assignment in such an unusual manner as to produce the same result. * * *

The case of *Johnson v. Houlditch* [1758], 1 Burr. 578, is in point to show the authority of the court to interfere and stay the proceedings in such a case. There the plaintiff had kept out of the way to prevent a tender of the debt, and the court, upon the ground that the suit was oppressive, ordered the suit to be stayed upon payment of the amount due, without costs, although a technical right of action existed when the suit was brought.” In *Bell v. Romaine* (1878), 30 N. J. Eq. 24, it is said at page 28: “‘If the complainant has given further day of payment, or in any other way waived the payment, according to the letter of the bond, the default contemplated and provided against has not happened.’ [DeGroot v. McCotter (1866), 4 C. E. Gr. 175.]”

Pomeroy says upon this same subject: “It seems also that a court of equity may relieve against the effect of such provision, where the default of the debtor is the result of accident or mistake, and *a fortiori* when it is procured by the fraud or other inequitable conduct of the creditor himself.”

1 Pomeroy, Eq. Jurisp. (3d ed.) §439.

We might quote from the decisions of courts of other jurisdictions language similar to that just expressed, but we think we have quoted sufficiently to show that the general tendency of the decisions of the courts upon this sub-

ject is to hold that a suitor may not come into a court of equity and successfully invoke the aid of such court to foreclose a lien, and subject to sale the property of another on the account of a default for which such suitor is himself responsible, especially when the party in default stood ready and willing at the agreed time and place to prevent the default.

Appellant concedes that "if nothing were involved in this case but the right to recover upon the first note, the judgment is right," but insists that as it was "agreed in

9. the mortgage that the failure to pay any one of said notes at maturity should cause all of said notes to become due and collectible, the court is wholly without authority to say that the readiness of appellees to pay any of said notes at maturity should prevent the remaining notes from falling due."

It must be conceded that appellant's position is strongly supported by the authorities before cited, if he be right in his assumption that the finding of facts shows no more than a mere readiness of appellees to pay the first note at maturity, and the interest on the others at the time and place fixed in said note for its payment; but it is in this assumption that counsel are in error. The findings show more than a readiness on the part of appellees to pay. They show that appellee Thomas Nugent actually placed and kept on deposit in the bank where said note was made payable the money for the purpose of making such payment, with instructions to the bank that the money on deposit was for such purpose, and that payment was prevented on the day it was due on account of the failure of appellant to present said note, with the intent and purpose of causing a default in such payment in order to render all of said notes due so as to authorize suit thereon. Under such facts, to conclude other than as the lower court concluded in this case would be to run counter to the rules of equity, and permit the

mortgagee to take an unconscionable advantage of the mortgagor who was ready and willing to pay at the time and place prescribed in his agreement, but was prevented from so doing by the acts of the mortgagee. But appellant

8. insists that where the mortgagor fails to pay at the time fixed, he can be relieved from such default in payment only by showing that such payment was prevented "by accident, mistake or fraud of the creditor," and that none of such facts is found by the special findings in this case. If, in the absence of a finding of accident or mistake as the cause of the default, it were necessary to find that said default was caused by the fraud of the payee, appellant's contention would be supported by authority, because there is in this case no finding of fraud,

10. and we recognize the rule that requires fraud to be found as a fact and not left to inference where it is relied upon as a cause of action or defense. But we do not regard the holdings as requiring that fraud shall be proved in case accident or mistake is not proved. The decisions before cited include all inequitable conduct

8. on the part of the payee that causes the default. The payee is just as much bound by the terms of the provision upon which the default rests as is the maker. Such provision is not intended as a means whereby he may, at his own option, take advantage of the maker, and by his own conduct force the default; but, if he by his own act causes the default, whether the act on his part was by deceit and fraud, or by some other means, he may in no event take advantage of the default which he so caused. For these reasons we are of the opinion that there is no error in the conclusions of law on the facts found.

Appellant insists that neither the decision of the court nor the facts found are sustained by sufficient evidence.

But an examination of the evidence in the record

11. convinces us that there was evidence tending to support each finding, and that neither of the several

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grounds of the motion for a new trial, presenting this question in different forms, presents any reversible error.

The only other ground of the motion for a new trial, presented by the points and authorities of appellant, relates to the exclusion of certain offered evidence of appellant on cross-examination. We are of the opinion that no error was committed in the exclusion of this evidence; but, in any event, our view of the case, as before expressed, upon the question of there being no necessity for a finding of fraud in this case, eliminates any prejudicial or controlling influence resulting from the exclusion of the evidence offered. We find no error in the record.

Judgment affirmed.

TOLEDO, ST. LOUIS AND WESTERN RAILROAD COMPANY v. LANDER, ADMINISTRATOR.

[No. 6,988. Filed June 9, 1911.]

1. RAILROADS.—*Crossing Accidents.—Death.—Beneficiaries.—Complaint.*—A complaint against a railroad company for the negligent killing of decedent upon a highway crossing must allege the existence of the beneficiaries of such action, such question of beneficiaries being made an issuable fact by the filing of a general denial. p. 59.
2. RAILROADS.—*Crossing Accidents.—Death.—Beneficiaries.—Complaint.*—A complaint alleging that plaintiff's decedent was killed, "leaving surviving him as his only heirs at law and next of kin Cora Lander, his widow, and Vera Lander, and Lucile Lander, his infant children," shows his beneficiaries sufficiently "to enable a person of common understanding to know what is intended." p. 59.
3. RAILROADS.—*Crossing Accidents.—Death.—Beneficiaries.—Complaint.*—A complaint alleging that defendant railroad company negligently killed plaintiff's decedent, that he was an able-bodied man capable of earning five dollars a day, that the action was prosecuted for the benefit of decedent's widow and children who have suffered damage in a certain amount, sufficiently shows that defendant's negligence caused decedent's death and that the beneficiaries were damaged thereby. p. 60.

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4. **RAILROADS.**—*Negligence.*—*Contributory.*—*Verdict.*—A general verdict for the plaintiff, in an action against a railroad company for negligently killing decedent, constitutes a finding that the defendant was negligent and that decedent was free from contributory negligence. p. 61.
5. **RAILROADS.**—*Crossing Accidents.*—*Contributory Negligence.*—*Interrogatories.*—Answers to interrogatories that the decedent riding in an open buggy approached the railroad crossing at the rate of two miles an hour, that the defendant company ran its train at the rate of 40 miles an hour, that when decedent was 40, 30, 20 and 10 feet, respectively, from the crossing he could have seen the train 496, 455, 412 and 364 feet, respectively, that no whistle was sounded and no bell rung, and that buildings and a live engine standing nearby prevented his hearing the train, are not in irreconcilable conflict with a general verdict for the plaintiff. p. 61.
6. **RAILROADS.**—*Crossings.*—*Look and Listen Rule.*—It is the duty of a traveler approaching a railroad crossing to listen and look for approaching trains, to such extent as the surroundings permit, before attempting to cross, and a failure therein precludes a recovery on the ground of contributory negligence. p. 63.
7. **RAILROADS.**—*Duty.*—*Performance.*—*Presumptions.*—*Negligence.*—A traveler may properly assume that a railroad company will perform its duty in reference to the giving of the statutory signals, and its failure so to do constitutes negligence. p. 63.
8. **RAILROADS.**—*Failure to Give Signals.*—*Travelers.*—*Care Required.*—The failure of a railroad company to give the statutory signals at a highway crossing will not justify a traveler in failing to exercise care commensurate with the usual dangers of crossing the track. p. 63.
9. **RAILROADS.**—*Crossings.*—*Negligence.*—*Evidence.*—Evidence that defendant railroad company ran its train forty miles an hour, that the plaintiff's decedent was riding in a buggy and could have seen the approaching train three seconds before it killed him, that obstructions prevented his hearing the train, that no crossing signal was given, and that he turned his horse to avoid a collision, but the train struck the horse, killing decedent, sustains a verdict for the plaintiff. p. 64.
10. **TRIAL.**—*Imperfect Instructions.*—*Harmless Error.*—The giving of an instruction which is imperfect, but which in the light of other instructions given, could not have misled the jury, does not constitute reversible error. p. 65.
11. **RAILROADS.**—*Crossing Accidents.*—*Contributory Negligence.*—*Instructions.*—In an action by the personal representative of decedent who was killed by a railroad company on a highway crossing, an instruction that the plaintiff, on proof of defendant's neg-

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ligence, should recover unless the decedent "contributed materially and directly to his death," is not erroneous. p. 65.

12. RAILROADS.—*Crossings.—Statutory Duties.—Instructions.*—An instruction practically quoting the statute requiring railroad companies to equip locomotives with a whistle and a bell, prescribing the use thereof, and the penalty for the neglect thereof, and instructing the jury that if certain facts were found, the law would authorize a recovery by the plaintiff, is not bad because the penalty had reference to engineers, where such feature of the instruction was not afterwards referred to, and where there is nothing in the record to show that the jury was influenced against the company. p. 65.
13. RAILROADS.—*Damages.—Evidence.—Instructions.*—An instruction, in a personal injury case against a railroad company, which does not set out the elements of damages recoverable but limits such damages to the sum that the jury may believe that he "ought to recover," not exceeding the demand, when considered with other instructions limiting the recovery to the amount warranted by the evidence, is not misleading. p. 66.
14. TRIAL.—*Incomplete Instructions.—Duty of Objecting Party.*—Where an instruction is merely incomplete, the party complaining thereof should present to the trial judge a complete one. p. 66.
15. TRIAL.—*Instructions.—Applicability.*—Instructions not applicable to the evidence should be refused. p. 66.
16. TRIAL.—*Instructions.—Duplication.*—Instructions should not be duplicated. p. 66.

From Miami Circuit Court; *Joseph N. Tillett*, Judge.

Action by Thomas Lander, as administrator of the estate of Harry E. Lander, deceased, against the Toledo, St. Louis and Western Railroad Company. From a judgment on a verdict for plaintiff for \$5,000, defendant appeals. *Affirmed.*

Guenther & Clark, Clarence Brown, Charles A. Schmettau and Robert J. Loveland, for appellant.

St. John, Charles & Gemmill, Antrim & McClintic and Thomas B. Dicken, for appellee.

MYERS, J.—This was an action by appellee against appellant to recover damages for the alleged negligent killing of Harry E. Lander at a grade crossing in the town of Van Buren. There was a trial by jury, with a general verdict

and a judgment in favor of appellee. The jury with its general verdict returned answers to eighty-six interrogatories, on which appellant moved for judgment in its favor.

The errors assigned and presented call in question the action of the court in overruling a demurrer, for want of facts, to the first paragraph of the complaint, and in overruling appellant's motion for judgment on the answers of the jury to the interrogatories, and its motion for a new trial. The objections lodged against the first, are alike applicable to the second paragraph of the complaint.

The brief of appellant, omitting the caption, sets out a copy of the first paragraph of the complaint, but makes no mention of the second paragraph. The objections urged against the first paragraph are that it does not positively allege in traversable form (1) that decedent left surviving him a widow, children, or next of kin; (2) that it is not alleged that the beneficiaries were injured by reason of the acts of negligence charged; (3) that if damages to the beneficiaries are alleged, it does not connect the damages with the negligent acts of which complaint is made. We shall hereafter refer to this paragraph as the complaint.

It is true the complaint must allege the existence of persons to whom, under the statute, the damages inure. §285

Burns 1908, Acts 1899 p. 405. It is one of the is-

1. suable facts to be proved, and is put in issue by the general denial. *Chicago, etc., R. Co. v. Laporte* (1904), 33 Ind. App. 691. The complaint states "that

Harry E. Lander died intestate, leaving surviving

2. him as his only heirs at law and next of kin, Cora Lander, his widow, and Vera Lander and Lucile Lander, his infant children." Our code of civil procedure (§343 Burns 1908, subd. 2, §338 R. S. 1881) provides that a complaint shall contain "a statement of the facts constituting the cause of action, in plain and concise language, without repetition, and in such manner as to enable a person of common understanding to know what is intended." While

this provision of our code does not change the rule requiring material facts to be alleged directly, and not by way of recital, yet it would be exceedingly technical to hold that the quoted allegation of the complaint stated only by way of recital the fact that the decedent left a widow and two infant children. The allegation states more than one fact, but in plain and concise language. It might technically be subject to criticism, but not for any omission or defect that could have affected the substantial rights of appellant. The objection is not well taken. §407 Burns 1908, §398 R. S. 1881; *Louisville, etc., R. Co. v. Kendall* (1894), 138 Ind. 313; *Chicago, etc., R. Co. v. Laporte, supra*.

Appellant in support of the second and third objections, cites a number of cases in which definitions of actionable negligence are given, affirming the

3. asserted weakness in the complaint before us. There is no contention that the complaint fails to charge negligence on the part of the appellant, or that such negligence was the proximate cause of the death of Harry E. Lander. Following these allegations, the age of Lander at the time of the accident is shown, and it is alleged that he was a healthy, able-bodied man, and capable of and was earning \$5 a day. It is also stated that the action is prosecuted for the benefit of his said widow and infant children, who have suffered damages because of the death of said Lander in the sum of \$10,000. The complaint states facts showing a cause of action against appellant, in favor of Lander, had he lived; but as he died from the effect of injuries received because of the negligence of appellant, the action which he might have maintained survived to his personal representative. Therefore, if the complaint was sufficient to show that it was appellant's failure to perform a duty it owed to decedent that proximately caused his death, the law steps in and names his widow and children, who, under the showing made in the complaint, are his beneficiaries and entitled to the benefit of any recovery had in

such action, on the theory that the death of the decedent, caused in the manner and form set forth in the complaint, as a natural sequence, resulted to the damage of those dependent upon him, they being within the class named in the statute. §285, *supra*. See, also, *Clore v. McIntire* (1889), 120 Ind. 262; *Korraday v. Lake Shore, etc., R. Co.* (1892), 131 Ind. 261.

Claim is made that the facts found by the jury in answer to interrogatories conclusively show that decedent's negligence contributed to his injury and death. The

4. general verdict is a finding of actionable negligence on the part of appellant, and that decedent was free from contributory negligence.

The facts which are said to be in irreconcilable conflict with the general verdict, and relied on to support the charge of contributory negligence on the part of decedent,

5. may be stated as follows: A few minutes after 7 o'clock on the morning of May 29, 1905, decedent, while riding in an open buggy, north on First street in the city of Peru, with two of his employes, one of whom was driving the horse drawing the vehicle, was killed at a grade crossing in a collision with one of appellant's west-bound passenger-trains. The railroad track from where it crosses First street eastward, makes a four-degree curve to the north. North of the main track, also crossing First street, was a side-track, on which, east of said crossing, stood a number of freight-cars. At the west line of First street, and on the south side of appellant's main track, a switch track connected, which extended west. On this switch track, at the time of said collision, and close to said crossing, headed east, stood one of appellant's locomotives, from which steam was escaping, making a loud noise. Main street connects with First street 427 feet south of said crossing, and from that point north to the crossing a view of the railroad track to the east, or of cars approaching from the east, was obstructed by buildings, and they could not be seen by

a traveler on First street south of the crossing, going north, until a point about forty feet south of the track was reached, from which point, on the morning of the accident, one looking east could see an approaching train for a distance of 496 feet; at a point thirty feet from the crossing a train 455 feet distant could be seen; twenty feet from the crossing a train could be seen 412 feet distant, and ten feet south of the crossing a train could be seen at a distance of 364 feet. Decedent approached the crossing traveling at the rate of two miles an hour, and for a distance of 700 feet appellant's train approached the crossing at an average speed of forty miles an hour, actually passing over the crossing at about thirty miles an hour. The engineer, as soon as he saw decedent's perilous position, attempted to check the speed of the train, but not in time to stop the engine before the accident. An instant before the collision, decedent was heard to say "Look out," the horse was turned to the left, and the accident happened. When decedent was forty and thirty feet south of the crossing, the train was not in sight. The whistle on the engine was sounded for Van Buren station, but it was not sounded for said First street crossing, nor was it sounded for the road crossing situated about one-half mile east of First street. The sounding of the whistle for the station could not have been heard by decedent, because of the buildings on the east side of First street, the rattle of said vehicle, and the noise of the escaping steam from the engine on the side-track west of First street. Decedent knew he was approaching the crossing, and was familiar with it. The train was scheduled to arrive at Van Buren at 7:05 o'clock a.m., but was from ten to fifteen minutes late. These facts, found by the jury, may be readily reconciled with the general verdict, supported by all intendments that might have been drawn from evidence admitted within the issues of the cause. The failure of the occupants to stop the horse in time to avert the accident

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might have been explained so as clearly to warrant the jury in finding decedent free from contributory negligence. If this was done—and for the purposes of this motion we must assume that it was—then the court committed no error in overruling it.

In support of the motion for a new trial, it is insisted that the verdict is not sustained by sufficient evidence, and that the court erred in giving instructions five, eight, nine and eighteen, tendered by appellee, and in refusing to give instructions one and thirty-one tendered by appellant.

Appellant earnestly contends that the evidence in this case brings it within the rule that one who approaches a railroad crossing with which he is familiar, and at-

6. tempts to cross without looking and listening for approaching trains, when it is possible to do so, is guilty of such contributory negligence as to preclude him from a recovery if he is injured. This rule is correct, for every person who is in possession of all his faculties must use them as an ordinarily careful and cautious person would to avoid injury from passing trains at highway crossings. *Lowden v. Pennsylvania Co.* (1908), 41 Ind. App. 614. It is his duty to look both ways and to listen for approaching trains, to such extent as the surroundings will permit of such precautions, before attempting to cross the track. *Mann v. Belt R., etc., Co.* (1891), 128 Ind. 138; *Ohio, etc., R. Co. v. Hill* (1889), 117 Ind. 56. He has a right to expect that the railroad company will per-

7. form its duty, and give the statutory crossing signals, and its failure to do so will be regarded as negligence. *Baltimore, etc., R. Co. v. Young* (1899), 153 Ind. 163; *Cleveland, etc., R. Co. v. Carey* (1904), 33 Ind. App. 275; *Indianapolis St. R. Co. v. O'Donnell* (1905), 35 Ind. App. 312.

But such failure will not absolve the traveler from

8. the exercise of care commensurate with the danger of which he is bound to take notice, by reason of the

fact that it is a railroad crossing, and that trains may pass at any time. *Evansville, etc., R. Co. v. Clements* (1904), 32 Ind. App. 659.

We have carefully examined the evidence in this case, from which we conclude that the jury might reasonably have found that decedent cautiously and prudently

9. approached appellant's railroad track. If it could be said from the evidence that he knew the scheduled time for the arrival of the train at Van Buren, it does not appear that he knew it was ten or fifteen minutes late. As we have seen, he was bound to look not only to the east for approaching trains, but to the west as well. The standing engine on the side-track south of the main track and west of the crossing, partially obstructed the view of the track to the west. Decedent was about twelve or fourteen feet from the head of the horse, and the front feet of the horse were close to the south rail of the track when the occupants of the buggy discovered the approaching train. Immediately the driver turned the horse toward the west, but not in time to get it far enough from the track to prevent the engine from striking it in the side, and throwing the occupants from the buggy. There is evidence tending to show that the train that struck the decedent's horse was only about three seconds distant when first the decedent could have seen it had he been looking in that direction, but he and the other occupants of the buggy, were looking west for an approaching train. They had looked east when about eighteen feet from the track, and no moving train was in sight. The train that struck the horse could not be heard because of escaping steam from one of appellant's engines west of the crossing. They heard no signal, and none was given for First street crossing. The evidence is conflicting as to whether a signal was given for a highway crossing, known as Corey's crossing, 2,097 feet east of First street crossing, and we may assume it was not. No signals were given after passing Corey's crossing. The evidence is voluminous, and

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we shall not attempt to refer to all the facts it tends to prove, favorable to the general verdict. From all the facts and circumstances disclosed by the evidence, the question of decedent's negligence was for the jury.

It is next insisted that instruction five, tendered by appellee and given to the jury, was erroneous and harmful to appellant. This instruction is criticised on the ground

10. that it permits a recovery upon proof of negligent acts not alleged in the complaint; also for the reason that it authorizes plaintiff to recover, unless decedent "contributed materially and directly to his death." The instruction was not carefully prepared, and is not approved, for the reason that it contains incomplete statements of the law; but when considered with other instructions in the case, which explicitly inform the jury as to the law referred to in this instruction, we are convinced that the jury was not misled, nor the plaintiff harmed thereby. The word

"materially" as used in this instruction has been

11. many times held by the Supreme Court and this court not to render the instruction erroneous. We cannot hold to the contrary as it would contravene a ruling precedent of the Supreme Court. *Citizens St. R. Co. v. Twiname* (1887), 111 Ind. 587; *Toledo, etc., R. Co. v. Goddard* (1865), 25 Ind. 185; *Pennsylvania Co. v. Sinclair* (1878), 62 Ind. 301; *Citizens St. R. Co. v. Albright* (1896), 14 Ind. App. 433; *Union Traction Co. v. Vandercook* (1904), 32 Ind. App. 621; *Indianapolis, etc., Transit Co. v. Edwards* (1905), 36 Ind. App. 202.

Instruction nine, after practically quoting the statute requiring all railroad companies operating railroads in this

State to equip their locomotives with a whistle and a
12. bell, and prescribing the duties of the engineer with reference to their use, and the penalty for the neglect of such duties, continues by telling the jury if it finds certain facts to be true, then it would be au-

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thorized to find for the plaintiff. This instruction is criticized on the ground that it is erroneous because it refers to the penalty of the statute with reference to engineers. The objection is not without some merit, but as this feature of the instruction was not afterwards referred to or emphasized, and nothing appearing in the record to indicate that it in any manner influenced the jury as against the company, the only defendant, we are not persuaded that it created a prejudice in the minds of the jurors which led them to an incorrect verdict

Instruction eighteen is objected to on the ground that it failed to inform the jury as to the elements of damage it should take into consideration in determining the
13. amount of plaintiff's recovery. While the jury should be instructed as to the legal measure of damages, and not be left to assess plaintiff's "damages at such sum as you may believe he ought to recover, not exceeding \$10,000," yet when this instruction is taken in connection with another instruction which limits the plaintiff's recovery
14. to the evidence in the case, it does not present reversible error. If appellant desired a more specific instruction as to the measure of damages, it should have asked it.

Instruction one tendered by appellant and refused
15. by the court directed the jury to find for defendant.

The evidence did not warrant the giving of this instruction.

Instruction thirty-one, refused by the court, was
16. fully covered by other instructions tendered by appellant, and by the court given to the jury.

Finding no reversible error in the record, the judgment is affirmed.

CUMBERLAND TELEPHONE AND TELEGRAPH COMPANY
v. KRANZ.

[No. 7,244. Filed June 9, 1911.]

1. TRIAL.—*Special Findings.*—*Purpose.*—The purpose of a special finding is to set out the ultimate facts proved, and not conclusions therefrom, and, to authorize a recovery, such findings must contain every fact necessary thereto. p. 72.
2. NEGLIGENCE.—*Question of Law or Fact.*—Negligence is sometimes a question of fact, sometimes a question of law and sometimes a mixed question of law and fact; but where the facts are undisputed, or where a special finding is made, negligence becomes a question of law. p. 73.
3. NEGLIGENCE.—*Proximate Cause.*—*Question of Law or Fact.*—Where the facts are undisputed, what is the proximate cause of an injury is a question of law. p. 73.
4. TRIAL.—*Conclusions of Law.*—*Defects.*—*Correct Judgment.*—The failure correctly to state conclusions of law, where a correct judgment is rendered on the facts found, constitutes harmless error. p. 73.
5. TELEGRAPHS AND TELEPHONES.—*Suspending Uninsulated Telephone Wire over Trolley Wire.*—*Negligence.*—The maintenance of an uninsulated telephone wire over a trolley wire constitutes negligence. pp. 73, 75.
6. ELECTRICITY.—*Use of.*—*Care Required.*—Electricity is highly dangerous, and persons making use thereof are required to use care commensurate with the dangers thereof. p. 74.
7. TELEGRAPHS AND TELEPHONES.—*Electricity.*—*Injury to Animals on Private Grounds.*—Where a telephone company maintained an uninsulated wire over a trolley wire, and such telephone wire broke and fell on the trolley wire, thereby becoming charged with electricity and killing plaintiff's horses, the fact that such horses, at the time they were killed, were on private property, does not affect such company's liability, so long as they were there rightfully. p. 74.
8. TELEGRAPHS AND TELEPHONES.—*Maintenance of Telephone Wire over Trolley Wire.*—*Injuries to Animals.*—*Proximate Cause.*—The maintenance of an uninsulated telephone wire over a trolley wire, such telephone wire breaking during a storm and falling upon the trolley wire, thereby killing plaintiff's horses, constitutes the proximate cause of the death of such horses. p. 74.
9. NEGLIGENCE.—*Proximate Cause.*—*What is.*—The proximate cause of an injury or death is the decisive cause. p. 74.

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10. NEGLIGENCE.—*Contributory.—Burden of Proof.—Destruction of Property.*—In actions for the destruction of property by negligence, the burden of proving freedom from contributory negligence is upon the plaintiff. p. 75.
11. NEGLIGENCE.—*Contributory.—Freedom From.—Special Findings.—Telephone Wires.—Driving over.*—Special findings that defendant telephone company's broken wire, heavily charged with electricity, was lying upon the ground, which was covered with grass and weeds tending to obscure the wire, and that plaintiff's servant, who was competent and who, in a careful manner, drove plaintiff's team upon it, both horses being killed, sufficiently show freedom from contributory negligence. p. 75.
12. NEGLIGENCE.—*Proximate Cause.—Contributory Negligence.*—Where plaintiff shows that defendant's negligence was the proximate cause of the death of his two horses, and that plaintiff did not contribute thereto, he is entitled to recover. p. 76.

From Clark Circuit Court; *Harry C. Montgomery*, Judge.

Action by Leonard Kranz against the Cumberland Telephone and Telegraph Company. From a judgment for plaintiff, defendant appeals. *Affirmed.*

M. Z. Stannard and *Jonas G. Howard*, for appellant.

J. K. Marsh, for appellee.

IBACH, J.—This was an action in tort brought by appellee to recover damages against appellant and the Louisville and Northern Railway and Lighting Company, for the alleged negligent killing of two horses, the property of appellee. Appellant owned and operated a telephone line. Its codefendant owned and operated an electric railway. During a wind-storm appellant's telephone wire fell and rested in part on the railway company's trolley wire and in part on the ground, and by contact with said trolley wire the telephone wire became charged with an electric current. As the telephone wire was thus resting on the ground, charged with the current from the trolley wire, appellee's servant attempted to drive the horses across it, and they received an electric shock from the telephone wire, which killed them.

The case was tried by a jury, and a verdict returned in favor of defendant railway and lighting company, but

against defendant telephone company. Appellant's motion for a new trial was granted, and the issue between appellee and appellant was tried a second time by the court without a jury. The court made a special finding of facts and stated conclusions of law thereon.

It is assigned for reversal of the judgment that the court erred in each of its conclusions of law stated upon the special finding of facts.

We shall set out the substance of the special finding of facts, the twenty-fourth, twenty-fifth, twenty-seventh, twenty-eighth, twenty-ninth and thirtieth findings being set out in full.

The Louisville and Northern Railway and Lighting Company, hereinafter designated as the railway company, operated an electric railway in Clark county, Indiana. Appellee owned a tract of land adjacent to the main line of this railway, on which, prior to April, 1907, he established a cold-storage plant, located 1,300 feet west of the main line of the railway, which plant he was operating on July 11, 1907. Prior to April, 1907, he arranged with the railway company to build a switch from its main line to his storage plant, and agreed to convey to the company a strip of ground forty feet wide for a right of way, which right of way was surveyed by the railway company, and stakes were set along it. During April, 1907, appellant Cumberland Telephone and Telegraph Company, hereinafter designated as the telephone company, at plaintiff's request, constructed a branch telephone line leading to the cold-storage plant, and continued to operate this line until after July 11, 1907. In constructing this line the telephone company attached its wire to a telephone pole that stood north of the forty-foot strip of ground, and to a cherry tree that stood about seventy-five feet south of this strip, and to other trees south of the cherry tree, the distance between the telephone pole and the cherry tree being about one hundred twenty-five feet, and between the cherry tree and the next tree south

to which the wire was attached, about three hundred feet. The telephone wire extended transversely across the forty-foot strip of ground, and was suspended from seven to ten feet above the ground where it crossed, without support of any character between the pole and the cherry tree, in which condition it remained until changed by the railway company as hereinafter described. In May, 1907, appellee conveyed by deed, according to his agreement, the forty-foot strip of ground to the railway company for a right of way, and in June, 1907, that company began the construction of a switch, in pursuance of its agreement, and notified the telephone company to remove its wire at the point where it crossed the right of way, which the telephone company failed to do. In June, 1907, the railway company constructed the switch, and in so doing erected a line of trolley poles along its right of way, and strung upon these poles a trolley wire, at the height of twenty-five feet above the ground, and, without detaching the telephone wire from the telephone pole or the cherry tree, raised said wire to a point eighteen inches above the trolley wire, and attached it to the arm of one of the trolley poles. This wire was then twenty-six and one-half feet from the ground, eighteen inches above the trolley wire, and the two wires remained in such condition, with the knowledge of the two companies, until the telephone wire fell, as hereinafter described. At the point where the wires crossed neither was insulated, and no guard was placed about them to prevent the telephone wire from resting on the trolley wire, in the event of its falling. The wires could have been so guarded as to prevent such resting in such event, and could have been so insulated that an electric current transmitted through the trolley wire could not be communicated to the telephone wire, in case of its falling and resting on the trolley wire. In June, 1907, the railway company began to operate cars on the switch by electric power, transmitted through its said trolley wire at a current strength of 500 volts, and the cars were being

so operated on July 11, 1907, at the time appellee's horses were killed. At about 4 o'clock p.m., July 11, 1907, a wind-storm occurred in the vicinity of the switch, cold-storage plant and telephone line. "(24) During said storm said branch telephone wire became detached from one of the trees located south of said cherry tree, and having become so detached became so slackened that one portion thereof rested on said trolley wire, and another portion thereof, which was between said cherry tree and the next tree south thereof, lay and rested upon the ground. (25) At the place where said portion of said branch telephone wire so rested on the ground, the ground was covered with a growth of grass and weeds, which tended to obscure it from the view of one driving over said place. (26) On July 11, 1907, plaintiff was the owner of two horses and a wagon, which horses were of the value of \$—, and had in his employ a competent driver. (27) On said July 11, 1907, and after said storm had subsided, and while said branch telephone wire was so resting in part on said trolley wire and in part on the ground, and while said trolley wire was by said Louisville and Northern Railway and Lighting Company so charged with an electric current of 500 volts, and while plaintiff's said horses, * * * hitched to said wagon, were by plaintiff's said driver being carefully driven across said land from said cold-storage plant to a public highway, and across the place where said branch telephone wire was so lying upon the ground, said horses came in contact with that part of said branch telephone wire that was so lying upon the ground, and by reason thereof received an electric shock by which they were then and there instantly killed. (28) The electric shock, by reason of which said horses were killed, was the same that was so transmitted through said trolley wires by said Louisville and Northern Railway and Lighting Company, and from said trolley wire communicated to and transmitted through said branch telephone wire. (29) Said horses on said occasion were so driven by said driver

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in a careful and prudent manner, and said injury to said horses, from which their death so resulted, arose without the fault or negligence of plaintiff. (30) By reason of the death of said horses plaintiff has sustained damages in the sum of \$400, which sum is due and unpaid.”

The court stated the following conclusions of law:

“(1) Defendant Cumberland Telephone and Telegraph Company, by suffering its branch telephone wire to be and remain above the trolley wire of the Louisville and Northern Railway and Lighting Company, without being insulated or guarded, was guilty of negligence. (2) The negligence of the Cumberland Telephone and Telegraph Company, in permitting its branch telephone wire to be and remain above the trolley wire of the Louisville and Northern Railway and Lighting Company without being insulated or guarded, and while said trolley wire was heavily charged with an electric current, was the proximate cause of the death of plaintiff’s horses, and that by reason thereof plaintiff has sustained damages in the sum of \$400. (3) Plaintiff was not guilty of contributory negligence. (4) Plaintiff’s driver, who was in charge of plaintiff’s horses at the time they were killed, was not guilty of contributory negligence.”

Appellant objects that the first conclusion of law is not supported by the finding of facts, and claims that the negligence of appellant should have been found as an inferential fact. To the second conclusion of law it makes a similar objection, urging that the findings should have stated as an inferential fact that the alleged negligent act was proximate cause of the injury

To find the ultimate facts of the case, and not conclusions of law or fact therefrom, is the province of a special finding.

But every fact necessary to plaintiff’s recovery must

1. be embraced within the special finding. Negligence is sometimes a question of fact, sometimes of law, sometimes a mixed question of law and fact. But where

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the facts are undisputed, as where the jury have
 2. agreed upon and returned a verdict setting forth the principal contested facts, or where the court has found the facts specially, it then becomes the province of the court to settle the question of negligence as a matter of law. *Conner v. Citizens St. R. Co.* (1886), 105 Ind. 62, 55 Am. Rep. 177; *Louisville, etc., R. Co. v. Roberts* (1897), 18 Ind. App. 538; *Lake Shore, etc., R. Co. v. Brown* (1908), 41 Ind. App. 435; *Cleveland, etc., R. Co. v. Haas* (1905), 35 Ind. App. 626; *Pittsburgh, etc., R. Co. v. Seivers* (1904), 162 Ind. 234.

Where the facts are undisputed, what constitutes a proximate or a remote cause of an injury is a question of law for the court. *Haskell & Barker Car Co. v.*

3. *Przedziankowski* (1908), 170 Ind. 1, 14 L. R. A. (N. S.) 972, 127 Am. St. 352; *P. H. & F. M. Roots Co. v. Meeker* (1905), 165 Ind. 132.

If the court states an erroneous conclusion of law, or fails properly to state the conclusions of law, it is not available as error by an exception to the conclusions of law, if

4. a proper judgment has been rendered on the facts.

If error has been committed in the conclusion of law, the rendering of a proper judgment on the facts makes this error harmless. *Krug v. Davis* (1885), 101 Ind. 75; *White v. Chicago, etc., R. Co.* (1890), 122 Ind. 317, 7 L. R. A. 257; *Nelson v. Cottingham* (1899), 152 Ind. 135; 2 Woollen, Trial Proc. §4350.

We shall now consider the facts found in the present case and determine whether on these facts appellee should recover. The negligence charged against appellant is

5. the maintenance of its wire suspended above the trolley wire, under the circumstances set forth above, without insulation or guard. Under the best authority we must hold appellant negligent. It knowingly allowed its wire to remain suspended at a very short distance from the

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trolley wire carrying a powerful and deadly current of electricity, under such conditions that if the telephone wire should break, or become loosened—an occurrence likely to happen—it could scarcely fail to rest on the trolley wire, become charged with the current from that wire, and become a thing of menace and danger. Electricity is an

6. agency of the greatest danger, and of a secret, deadly character, and those persons who employ it must use care to prevent injury, proportionate to the dangerous character of the agency, thus imposing upon them a very high degree of care. The wire in the present case could easily have been guarded. It makes no difference that ap-

7. pellee's horses were on private property when killed, and not in a public highway, for an electric company is liable for injuries occasioned on private property by its negligence, if the person or animal injured had a right to be on such private property, and owes to any and all persons rightfully on private property the duty of maintaining its wires in a reasonably safe condition. *Central Union Tel. Co. v. Sokola* (1905), 34 Ind. App. 429.

The negligence of appellant in maintaining its wire unguarded in close proximity to the trolley wire, under the circumstances set out in the special findings, was the

8. proximate cause of the death of the horses. The proximate cause of an injury is the responsible cause, the cause which is the active, operative, continuing and natural source of the injury. *Pittsburgh, etc., R. Co. v. Co-*

9. *zatt* (1907), 39 Ind. App. 682. The proximate cause of an injury is the moving cause—the cause without which the injury would not have occurred, although subsequent events or agencies may have helped to bring about the result. The real test of what is a proximate cause, when there are intervening agencies, is whether the result is such as might reasonably have been expected as the consequence of the original negligence, and if it is such, the liability continues in spite of an intervening cause or causes.

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29 Cyc. 499; *Central Union Tel. Co. v. Sokola, supra*; *Mize v. Rocky Mountain Bell Tel. Co.* (1909), 38 Mont. 521, 100 Pac. 971, 129 Am. St. 659. When the telephone company

5. allowed its wire to remain suspended above the trolley wire without guard or insulation, as in the present case, it might reasonably expect that the wire might become loosened or broken, rest on the trolley wire, and become charged with electricity, and that injury to persons or animals who came in contact with the wire might result therefrom. Below we cite cases in which a telephone or telegraph company has been held liable for injuries caused by its broken or sagging wires, which had become dangerously charged with electricity by coming in contact with wires carrying a higher electric current. *Central Union Tel. Co. v. Sokola, supra*; *Mize v. Rocky Mountain Bell Tel. Co., supra*; *Western Union Tel. Co. v. State, ex rel.* (1896), 82 Md. 293, 33 Atl. 763, 31 L. R. A. 572, 51 Am. St. 464; *McKay & Roche v. Southern Bell Tel. Co.* (1895), 111 Ala. 337, 19 South. 695, 31 L. R. A. 589, 56 Am. St. 59; *City Electric St. R. Co. v. Conery* (1895), 61 Ark. 381, 33 S. W. 426, 31 L. R. A. 570, 54 Am. St. 262; *Ahern v. Oregon Tel. Co.* (1894), 24 Or. 276, 33 Pac. 403, 35 Pac. 549, 22 L. R. A. 635; *Henning v. Western Union Tel. Co.* (1890), 41 Fed. 864; *Western Union Tel. Co. v. Thorn* (1894), 64 Fed. 287, 12 C. C. A. 104.

We therefore conclude, on the facts found, that appellant was negligent, and that this negligence was the proximate cause of the death of appellee's horses.

Before appellee could recover, the burden was on him to prove his freedom from contributory negligence. The court found as facts that at the point where the loosened

10. wire was resting on the ground the ground was covered with a growth of grass and weeds, which tended to obscure it from the view of one driving over the

11. place, that the horses were being driven by a competent driver in a careful and prudent manner, and

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that the injuries which resulted in their death arose without fault or negligence of appellee. This is a sufficient finding that appellee and his driver were free from contributory negligence.

It thus appears from the special finding of facts that appellant was negligent in maintaining its wire as it did, that

this negligence was the proximate cause of the death

12. of appellee's horses, and that appellee was not guilty of contributory negligence. On this state of facts the law is with appellee, and he should recover. As a proper judgment was rendered on the facts, and the conclusions of law were properly stated, the judgment is affirmed.

CITY OF INDIANAPOLIS v. SCHOENIG.

[No. 7,270. Filed June 9, 1911.]

1. APPEAL.—*Briefs.*—*Waiver.*—Points not discussed are waived. p. 78.
2. APPEAL.—*Variance.*—*New Trial.*—No objection to a complaint can be made on the ground that the evidence does not support it, such question being properly raised by a motion for a new trial. p. 78.
3. MUNICIPAL CORPORATIONS.—*Streets.*—*Defective Gutters.*—*Jury.*—Whether a gutter along a street, twenty-eight inches deep, and so situated that a pedestrian in the night might fall therein while passing along the street, was dangerous to pedestrians, is a question for the jury. p. 78.
4. MUNICIPAL CORPORATIONS.—*Streets.*—*Defects.*—*Evidence.*—*Question for Jury.*—Where the evidence in reference to an alleged defect in a street is without conflict, but reasonable men might differ as to whether such defect constituted a dangerous one, the question thereof is one for the jury. p. 80.
5. APPEAL.—*Weighing Evidence.*—*Streets.*—*Defects.*—A verdict, upon conflicting evidence, that a street was defective, is conclusive on appeal. p. 80.
6. MUNICIPAL CORPORATIONS.—*Streets.*—*Gutters.*—*Guards.*—It is the duty of a city in the construction of its streets to make the traveled way thereof and adjacent places reasonably safe for travel, and a failure therein renders it liable to one injured thereby. p. 80.

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7. MUNICIPAL CORPORATIONS. — *Streets. — Defects. — Contributory Negligence.—Care.*—A pedestrian who walks diagonally across a street instead of going straight across from sidewalk to sidewalk is not guilty of contributory negligence as a matter of law, such pedestrian being required to use care commensurate with the known danger; but where he is ignorant of the defect in the street that caused his injury, he may assume that the street is reasonably safe for travel. p. 81.
8. APPEAL.—*Record.—Instructions.—Failure to File.*—Where instructions are not brought into the record by a bill of exceptions, and the record fails to show that they were “filed with the clerk of the court at the close of the instruction of the jury” (§561 Burns 1908, Acts 1907 p. 652), they are not a part of the record and cannot be considered. p. 83.

From Morgan Circuit Court; *Joseph W. Williams*, Judge.

Action by Joseph Schoenig against the City of Indianapolis. From a judgment for plaintiff, defendant appeals. *Affirmed.*

Frederick E. Matson, James D. Peirce and Crate D. Bowen, for appellant.

Charles B. Clarke, Walter C. Clarke, Clement M. Holderman and Renner & McNutt, for appellee.

LAIRY, C. J.—This is an action brought by appellee for injuries received by him while traveling on one of the streets of appellant city. A complaint was filed in the Marion Circuit Court, to which appellant demurred for want of facts. This demurrer being overruled, appellant answered in general denial. A change of venue was then taken to the Morgan Circuit Court, where the cause was tried before a jury, resulting in a verdict for appellee in the sum of \$1,800, on which judgment was afterwards rendered.

From this judgment an appeal is taken, and the following errors assigned for reversal: (1) The complaint does not state facts sufficient to constitute a cause of action; (2) the court erred in overruling the demurrer to the complaint; (3) the court erred in overruling the motion for a new trial.

No objection to the complaint is pointed out by appellant in his brief, and no authorities are cited bearing upon this

proposition. The brief contains no argument as to

1. the sufficiency of the complaint, the only question raised with reference to it, being that the evidence in the record does not sustain it on the theory upon which it is drawn. This question cannot be considered as affecting the complaint, but can be properly considered only
2. in passing upon the motion for a new trial. Errors assigned but not discussed in the brief of the party assigning them will be treated as waived. *Stamets v. Mitchener* (1906), 165 Ind. 672; *Hoover v. Weesner* (1897), 147 Ind. 510; *Starkey v. Starkey* (1906), 166 Ind. 140; *City of Fort Wayne v. Patterson* (1900), 25 Ind. App. 547.

Several causes are assigned for a new trial, but the only ones discussed are the following: (1) The verdict is not sustained by sufficient evidence. (2) The verdict is contrary to law. (3) The court erred in giving certain designated instructions of its own motion. (4) The court erred in giving certain designated instructions requested by appellee. (5) The court erred in refusing to give certain designated instructions requested by appellant.

The evidence tends to show that appellee received the injuries for which he sues by falling into a deep gutter on the east side of Fulton street, near the corner of Ohio

3. street, in the city of Indianapolis, on the night of July 27, 1907. The first contention of appellant is that said gutter was necessary and proper for the purpose of draining the street, and that the manner of its construction was not such as to constitute a dangerous defect in the street. Upon this question the evidence tends to show that Ohio street and Fulton street intersect at right angles; that Ohio street runs east and west, and is paved with brick, and that Fulton street is a gravel way; that the curb and pavement which constitute the improvement on Ohio street extend up into Fulton street for a distance of sixteen feet and two inches from the curb line of Ohio street, and that Fulton street is paved with brick for that distance north of said

curb line; that there was a cement sidewalk five feet wide along the curb line on the north side of Ohio street east of Fulton street, and a sidewalk six feet wide along the east side of Fulton street next to the property line; that the cement curb which forms a part of the Ohio street improvement is constructed parallel with the north property line of said street, and distant therefrom sixteen feet and two inches, and that this curb turns the corner of Ohio and Fulton streets and extends north parallel with the east property line of Fulton street, and distant therefrom fourteen feet and eight inches to a point on a line with the north property line of Ohio street where the curb and also the brick pavement terminate. There is an oblong area eleven feet and four inches long from north to south and eight feet and four inches wide, located between the sidewalk and curb on Fulton street, and immediately north of the sidewalk on Ohio street. This area was about six inches above the paved street, and was filled with gravel flush with the top of the sidewalk and curb. Near the center of the north end of this area the old open gutter on the east side of Fulton street connected with a tile-drain ten inches in diameter, which was constructed under this area south to a sewer near the north curb line of Ohio street. The bottom of the tile at the north end of this area was about twenty-eight inches below the surface of the area described, and the gutter was so constructed at that point that the bottom of said gutter was on a level with the bottom of the ten-inch tile, and about twenty-eight inches below the surface of said area. Above the tile was placed a stone, which was level with the sidewalk and curb, and the gravel was filled in behind this stone, so as to leave an off-set or declivity of about twenty-eight inches at the north end of the described area. The gutter at that point was not covered, and there was no rail or guard to prevent a pedestrian from stepping off the north end of said area into said gutter, and being injured. In that part of the city, as shown by the evidence, some of the sidewalks were constructed along

and adjoining the property line, while others were constructed along the curb line. The area described was of such a character that in the nighttime it might easily be mistaken for a sidewalk, and a person crossing Fulton street from the west, by deviating slightly to the north without leaving the paved portion of the street, and stepping upon this raised area near the north end thereof, would be exposed to the danger of being injured as a result of the unguarded defect at the north end of said area. Whether the condition of the street described was of such a character as to be dangerous to pedestrians using the streets and sidewalks, was a question of fact for the jury. Where the evidence in reference to the condition of a street is without

4. conflict, and the condition shown is of such a character that different minds of equal intelligence and candor might honestly reach different conclusions upon the question as to whether the condition shown constituted a dangerous defect or condition, that question is one of fact for the jury. *Heckman v. Evenson* (1897), 7 N. Dak. 173, 73 N. W. 427; *Gerald v. City of Boston* (1871), 108 Mass. 580; *Dowd v. Inhabitants of Chicopee* (1874), 116 Mass. 93.

The jury having found by its general verdict that the

5. condition shown was such as to make the street unsafe for travel, this finding cannot be disturbed on appeal. The defendant city having created this condition should have taken such precautions as were reasonably necessary to make the street at that point ordinarily safe for travel; and

6. a failure so to do is negligence, and renders the city liable. *Higert v. City of Greencastle* (1873), 43 Ind. 574; *City of Delphi v. Lowery* (1881), 74 Ind. 520; *Jones v. Inhabitants of Waltham* (1849), 4 Cush. 299. In the case of *City of Vincennes v. Spees* (1905), 35 Ind. App. 389, the language of the court was as follows: "This duty extends not only to the traveled way of streets and alleys, but to adjacent conditions. Ordinarily fences or barriers are not required along highways to prevent travelers from straying

out of their limits, but if there are excavations or other dangerous defects or obstructions close to the way, the city or local authorities are required to erect barriers or take other proper precautions to warn travelers of the danger.”

The next contention of appellee is, that upon the undisputed facts, as disclosed by the evidence, appellee was guilty of contributory negligence. The evidence of appellee

7. shows that he walked east on the sidewalk on the north side of Ohio street, and started across Fulton street toward the northeast corner of Fulton and Ohio streets, and that after he crossed the street-car track he walked in a northeasterly direction, and stepped upon the curb at the north end of the raised area heretofore described in this opinion, and that in so doing he stepped off the declivity at the north end thereof, and was injured. His evidence shows that he did not walk directly east in crossing Fulton street and step upon the curb in a line with the sidewalk on the north side of Ohio street. Appellant insists that it thus appears that instead of traveling upon the sidewalk, which was safe and suitable for pedestrians, appellee, for his own convenience, attempted to cut the corner in a diagonal course, and thus unnecessarily exposed himself to the danger that caused his injury, and that he is therefore guilty of contributory negligence.

We cannot agree that the evidence shows without dispute that appellee intentionally left the way prepared by the city for the use of pedestrians. It is true that he walked in a northeasterly direction to the curb after crossing the street-car track, but he may have believed, from appearances, that the raised area between the curb and the sidewalk was the sidewalk on the east side of Fulton street intended for the use of pedestrians. The conditions shown by the evidence would have justified such an inference by the jury. We cannot, however, give our assent to the proposition that a pedestrian desiring to cross a street is bound to use the cross-

ing provided for that purpose, and that an attempt to cross at any other place is necessarily contributory negligence. Our Supreme Court has held that the fact that a footman undertakes to cross a street at a place other than the regular crossing for footmen will not, of itself, defeat an action for injuries caused by a horseman's negligently riding against him. *Simons v. Gaynor* (1883), 89 Ind. 165; *Stringer v. Frost* (1888), 116 Ind. 477, 2 L. R. A. 614, 9 Am. St. 875. In the case last cited the court said: "The plaintiff had the right to cross the street at the cross-walk or elsewhere, exercising such caution and prudence as the circumstances demanded to avoid being injured, while the defendant had the right to ride along the street, observing such watchfulness for footmen, and having his animal under such control, as would enable him to avoid injury to others who had corresponding and reciprocal rights in the street."

These cases are not directly in point, inasmuch as they do not hold that a pedestrian crossing the street at a point other than the regular crossing would not be guilty of contributory negligence so as to preclude a recovery for an injury caused by a defect in a street; but we think that the same rule should apply to such a case. If a person in walking diagonally across a street which he knows to be paved with brick or asphalt were to be injured by falling into an excavation in said street negligently left open and unguarded, he surely ought not to be held guilty of contributory negligence as a matter of law, merely because he was not using the crossing. If he knew of the dangerous condition of the street, a different question would be presented.

A person who attempts to cross a street at a place other than the crossing provided for that purpose, is bound to use care proportionate with the known danger; but if he knows of no dangerous excavation or obstruction he has a right to assume that all parts of the street intended for travel are reasonably safe for that purpose. *Brusso v. City of Buffalo* (1882), 90 N. Y. 679; *Collins v. Dodge* (1887), 37 Minn. 503,

35 N. W. 368; *Rea v. City of Sioux City* (1905), 127 Iowa 615, 103 N. W. 949; *Heckman v. Evenson, supra*; *Magaha v. Mayor, etc.* (1902), 95 Md. 62, 51 Atl. 832, 93 Am. St. 317; *Bennett v. Village of Sing Sing* (1891), 14 N. Y. Supp. 463.

There is no evidence that appellee had any knowledge of the defect in the street that caused his injury. The fact that he deviated slightly to the north in crossing Fulton street, and stepped upon the curb at a point twelve or fifteen feet north of the corner, did not constitute contributory negligence *per se*. The jury has by its verdict found that the appellant city was negligent, and that the appellee was free from contributory negligence, and there is evidence to sustain the finding upon both propositions.

Appellant complains of the action of the court in giving certain instructions to the jury, and in refusing to give certain instructions tendered by appellant. The appellee makes

the point that the instructions cannot be considered,

8. for the reason that they are not properly in the record. The instructions were not brought into the record by a bill of exceptions, and the record fails to show that either the instructions given, or those tendered and refused, were filed with the clerk of the court at the conclusion of the instruction of the jury or at any other time. The statute provides that "all instructions requested, whether given or refused, and all instructions given by the court of its own motion, shall be filed with the clerk of the court at the close of the instruction of the jury." §561 Burns 1908, Acts 1907, p. 652. We must assume that the purpose of this requirement of the statute was to identify the instructions that the court gave, as was required under §558 Burns 1908, §533 R. S. 1881, where no bill of exceptions was filed. *Hadley v. Atkinson* (1882), 84 Ind. 64, 66; *Thompson v. Thompson* (1901), 156 Ind. 276; *Cleveland, etc., R. Co. v. Ward* (1897), 147 Ind. 256; *Ohio, etc., R. Co. v. Dunn* (1894), 138 Ind. 18; *Van Sickle v. Belknap* (1891), 129 Ind. 558; *Butler v. Roberts* (1889), 118 Ind. 481; *Fort Wayne, etc., R. Co. v.*

Beyerle (1887), 110 Ind. 100; *Childress v. Callender* (1886), 108 Ind. 394; *Blount v. Rick* (1886), 107 Ind. 238; *Landwerlen v. Wheeler* (1886), 106 Ind. 523; *Aufdencamp v. Smith* (1884), 96 Ind. 328; *Weik v. Pugh* (1883), 92 Ind. 382; *McIlvain v. Emery* (1882), 88 Ind. 298; *Heaton v. White* (1882), 85 Ind. 376; *O'Donald v. Constant* (1882), 82 Ind. 212; *Supreme Lodge, etc., v. Johnson* (1881), 78 Ind. 110.

As the instructions are not in the record, no further question remains to be considered.

Judgment affirmed.

FIRST NATIONAL BANK OF DILLSBORO v. MULFORD ET AL

[No. 7,286. Filed June 20, 1911.]

1. **NEW TRIAL.—Complaint.—Exhibits.—Foreign Affidavits.—Authentication.**—An affidavit, certified by an officer of a sister state and attached as an exhibit to a complaint for a new trial on the ground of newly-discovered evidence, after the term, cannot be considered as a part thereof where it is not authenticated as required by §498 Burns 1908, §475 R. S. 1881, providing that “when any affidavit is taken in another state, and certified by the officer or justice of the peace taking the same, under his hand and seal of office, if he have any such seal, and attested by the clerk of the circuit or district court, or court of common pleas of the county where such officer exercises the duties of his office, under the hand of the clerk and seal of his court, the clerk also certifying that the officer or justice of the peace is, by the laws of said state, duly empowered to administer oaths * * * such affidavit shall be deemed sufficiently authenticated.” p. 87.
2. **NEW TRIAL.—Newly-Discovered Evidence.—How Shown.—Complaint.**—A verified complaint for a new trial on the ground of newly-discovered evidence, after the term, setting out the name of the witness relied upon and the facts to which he will testify, sufficiently shows such newly-discovered evidence without an exhibit setting out the authenticated affidavit of the witness. p. 88.
3. **PLEADING.—Motion for New Trial.—Newly-Discovered Evidence.**—In determining the sufficiency of a motion for a new trial on the ground of newly-discovered evidence, the court can look only to the facts set out in affidavits on file. p. 89.

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4. **NEW TRIAL.—Action for.—Newly-Discovered Evidence.—Procedure.**—The procedure in an action for a new trial on the ground of newly-discovered evidence, after the term, is similar in pleading and proof to any other civil action. p. 89.
5. **NEW TRIAL.—Newly-Discovered Evidence.—Diligence.—Complaint.**—A complaint for a new trial, after term, on the ground of newly-discovered evidence, must set out the facts showing the requisite diligence to discover such evidence before the trial. p. 90.
6. **NEW TRIAL.—Newly-Discovered Evidence.—Diligence.—Absent Witness.—Complaint.**—A complaint for a new trial, after the term, on the ground of newly-discovered evidence, alleging that the witness whose testimony was relied upon as a basis for securing such new trial was a defaulter and had absconded on August 8, 1907, and that from that time until his arrest, on April 28, 1908, appellant made diligent search for him in all parts of the world, but could not find him, shows sufficient diligence up to the time of the arrest, but not afterwards; and as neither the complaint nor the judgment sets out the date of the trial, the complaint is insufficient to show proper diligence before such trial. p. 90.

From Dearborn Circuit Court; *George E. Downey*, Judge.

Action by the First National Bank of Dillsboro, Indiana, against Cora P. Mulford and others. From a judgment for defendants, plaintiff appeals. *Affirmed.*

McMullen & McMullens, for appellant.

Givan & Givan, for appellees.

LAIRY, C. J.—The complaint in this case was filed in the Dearborn Circuit Court to obtain a new trial under the provisions of §589 Burns 1908, §563 R. S. 1881, providing for the granting of a new trial in cases where the cause therefor is discovered after the term at which the verdict or decision was rendered. The complaint was based on the ground of newly-discovered evidence.

The complaint alleges that appellant brought an action against Cora P. Mulford in the Dearborn Circuit Court, on May 15, 1907, upon a promissory note for \$135.90, and that the same plaintiff afterwards brought another action against Cora P. Mulford, Oliver P. Mulford and Ulysses G. Mul-

ford, upon two promissory notes executed by said defendants; that afterwards said actions were consolidated, and defendant Cora P. Mulford filed an answer, alleging that she was a married woman, and that she executed said note as surety for the other two defendants, and received no part of the consideration of said note. The complaint further shows that a trial was had upon the issues thus formed and a judgment rendered in favor of defendant Cora P. Mulford.

The complaint then alleges that Fred Lubbe was the cashier of the bank at the time said notes were executed, that he personally made the loan, was familiar with all the facts and circumstances of the transaction, and that he would testify that he made the loan directly to Cora P. Mulford and delivered the money to her, and that she represented that she was borrowing the money for her own use, and was not security for any person; that he relied upon these statements in making the loan, and was induced thereby to make it, and that he had no knowledge that any person other than Cora Mulford had any interest in the money realized therefrom. It is upon his testimony as set out in the complaint that appellant relies as its ground for a new trial.

The evidence introduced at the former trial is attached to the complaint as an exhibit, as is also a paper purporting to be an affidavit of Fred Lubbe, as to the facts within his knowledge, and to which he will testify in the event a new trial is granted. The complaint contains other averments, but we shall refer to only such parts of the complaint as are necessary to the understanding of the questions presented.

A demurrer to the complaint was sustained, appellant refused to amend or plead further, and judgment was rendered against it. The only question presented on appeal is the correctness of the ruling of the trial court in sustaining the demurrer to the complaint.

The complaint is objected to on the ground that the affi-

davit of Fred Lubbe attached to the complaint, and stating the facts to which he will testify, is not properly authenticated, and cannot be treated by the court as an affidavit. The objection to the sufficiency of the affidavit is well taken. Section 498 Burns 1908, §475 R. S. 1881, provides that "when any affidavit is taken in another state, and certified by the officer or justice of the peace taking the same, under his hand and seal of office, if he have any such seal, and attested by the clerk of the circuit or district court, or court of common pleas of the county where such officer exercises the duties of his office, under the hand of the clerk and seal of his court, the clerk also certifying that the officer or justice of the peace is, by the laws of said state, duly empowered to administer oaths and affirmations, and take affidavits, every such affidavit shall be deemed sufficiently authenticated, and may be received and used in any of the courts of this State."

It was held in the case of *Jackson v. State* (1903), 161 Ind. 36, that an affidavit filed in support of a motion for a new trial, taken in the State of Tennessee and not authenticated according to the requirements of the statute before quoted, could not be received or used in the courts of this State. The court said: "Authority to take and certify affidavits does not belong to the office of notary public at common law, but whether it does or not is immaterial, since a legislative enactment is paramount to the common law, and the above statute specifically prescribes how an affidavit taken in a foreign state must come authenticated to receive faith and credit in our courts. It is provided that an affidavit shall be subscribed and certified by the officer, or justice of the peace, under his hand and seal of office, if he have one, and attested by the clerk, who shall also certify that such officer, or justice of the peace, is by the laws of said state empowered to administer oaths and take affidavits. The fixing of the specific mode of authentication must be held to exclude all other modes, and hence the courts have

no authority to heed an affidavit that is not vouched in the manner provided by law.”

The affidavit, filed as an exhibit in this case, shows by its caption that it was taken in the county of Leavenworth, and

State of Kansas. As this affidavit is not authenti-

2. cated in accordance with the requirements of §498, *supra*, and cannot be considered in determining the sufficiency of the complaint, we are led to inquire whether it is necessary, in order to make the complaint in this case sufficient to withstand demurrer, that the affidavit of the person whose evidence is alleged to have been newly discovered, stating the facts to which he will testify, shall be filed with the complaint as an exhibit. It is undoubtedly true that a complaint to obtain a new trial, on the ground of newly-discovered evidence, must set out the evidence alleged to have been discovered, and if it consist of oral testimony, the name of the witness must be given, with a statement of the facts to which he will testify. These facts must appear either from the averments in the body of the sworn complaint, or from the affidavit of the person, by whom it is alleged they can be proved, filed as an exhibit. In this case, the body of the complaint, which is sworn to, contains a statement of the name of the witness by whom the facts alleged to be newly discovered can be proved, and also a statement of the facts to which he will testify. For the purpose of the demurrer, it is admitted that the witness named in the complaint will testify to the facts stated therein. The affidavit of the party by whom such facts could be proved would tend only to show the truth of the facts, which are admitted by the demurrer, and would therefore add nothing to the force or effect of such admission.

The case of *East v. McKee* (1895), 14 Ind. App. 45, is cited by appellant as tending to support his contention on this point. It does not appear in that case that the name of the witness and the facts to which he would testify were set out in the body of the complaint. If these facts do not

appear in the body of the sworn complaint they must appear by the affidavit filed therewith as an exhibit, or the complaint will be insufficient to withstand demurrer.

Where a motion for a new trial on the ground of newly-discovered evidence is filed, the motion should be supported by an affidavit of the person by whom it is alleged the newly-discovered facts can be proved, stating the facts to which he will testify, and that a failure to file such affidavit or to state a valid excuse for not doing so, will render the motion insufficient. *Ogden v. Kelsey* (1892), 4 Ind. App. 299; *McQueen v. Stewart* (1856), 7 Ind. 535; *Spaulding v. State* (1904), 162 Ind. 297.

In passing upon a motion for a new trial on the ground of newly-discovered evidence, the court must determine the

facts upon which the ruling is based from the affida-

3. vits on file. The motion is either granted or refused
● on the facts disclosed by the affidavits. Where a complaint to obtain a new trial on the ground of newly-discovered evidence is filed after the term, and its

4. sufficiency is tested by demurrer, quite a different question is presented. It is not then a question as to whether the facts pleaded in the complaint are true, but, considering them to be true, the question is whether the plaintiff is entitled to a new trial. If the complaint is held sufficient, the defendant may deny the facts alleged therein, in which case the plaintiff is required on the trial to sustain by a preponderance of the evidence every material fact upon which he relies for a new trial. After hearing the evidence, the court is called upon for the first time to determine the truth of the facts upon which he is to decide whether a new trial shall be granted or refused. It will readily be seen that the reasons for requiring an affidavit of the character referred to as a part of the motion for a new trial, on the ground of newly-discovered evidence, does not apply to a complaint to obtain a new trial for the same cause filed after term. We therefore hold that where the sworn complaint in

such a case states the name of the person by whom such newly-discovered facts can be proved, and the facts to which he will testify, such facts need not appear in an affidavit made by such person and filed as an exhibit.

The complaint is also assailed on the ground that the facts averred therein do not show that appellant exercised due diligence to discover the evidence before the trial, or

5. during the term at which the verdict was rendered or the decision made. A litigant seeking a new trial on the ground of newly-discovered evidence must allege facts showing that he has been diligent in his efforts to discover and produce the evidence, and that, despite such diligence, he was unable to discover it until after the term at which the verdict was returned or the decision rendered. *Hines v. Driver* (1885), 100 Ind. 315; *East v. McKee*, *supra*.

The rule requiring diligence to be shown has been enforced with great strictness. In the case of *Chicago, etc., R. Co. v. McKeehan* (1892), 5 Ind. App. 124, the court states

6. the rule thus: "The law treats with disfavor all attempts to reopen causes upon the ground of newly-discovered evidence, and never permits it to be done except upon a clear and unequivocal showing that the applicant was diligent in his efforts to procure the evidence for the first trial. It will be presumed that the litigant could have discovered the evidence in due time by the use of proper means, and this presumption can only be rebutted by a satisfactory showing to the contrary, particularly stating the means employed." As sustaining this principle we cite the following cases: *Baker v. Joseph* (1860), 16 Cal. 173; *Wynne v. Newman's Admr.* (1881), 75 Va. 811, 817; *Wallace v. Tumlin & Stegall* (1871), 42 Ga. 462; *Hobler v. Cole* (1874), 49 Cal. 250; *Moore v. Philadelphia Bank* (1819), 5 S. & R. 40; *People v. Sutton* (1887), 73 Cal. 243, 15 Pac. 86; *Keisling v. Readle* (1891), 1 Ind. App. 240.

As bearing upon the question of diligence, the complaint in this case shows that Fred Lubbe, the witness by whom

appellant states it is able to prove the facts upon which it relies for a new trial, left for parts unknown on August 8, 1907; that he was a defaulter and a fugitive from justice, and that his whereabouts was unknown until he was arrested on April 28, 1908, at Los Angeles, California; that from the time he left until the time of his arrest, the officers of appellant bank, by means of detectives and police departments, diligently prosecuted a search for him in all parts of the world. These averments show sufficient diligence on the part of appellant prior to the date of Lubbe's arrest on April 28, 1908, but no facts are alleged showing any diligence whatever after that time.

The complaint does not show the date upon which the trial took place. The averment of the complaint is "that said cause came on for trial in said Dearborn Circuit Court on the — day of ———, 1908, and was consolidated with cause number 3,621 in said court by agreement of parties." The complaint shows that the evidence was heard and a judgment rendered, but is silent as to the date upon which this occurred. From these averments the court cannot determine what time in the year of 1908 the case was tried. From aught that appears from the complaint, this trial may have occurred after the arrest of Lubbe on April 28, 1908. There is no averment in the complaint that the officers of appellant bank did not know of the arrest as soon as it occurred. They were in a position to know the connection which Lubbe had with the bank at the time the loan was made, and to know that his connection with the transaction was such as would, in all probability, enable him to know the facts pertaining to the execution of the notes. This being true, due diligence on the part of appellant required that its officers should place themselves in communication with Lubbe as soon as they learned of his arrest. If the case had not been tried at that time, they should have taken his deposition, and produced it at the trial; but if the case had been tried, and the term at which the trial occurred had not ex-

pired, they should have procured his affidavit and made use of it in an application for a new trial during the term. If the case had been tried at a term of court which had expired before the officers of appellant bank learned of the arrest of Lubbe, this fact should be averred in the complaint. The complaint avers that the officers of the bank did not learn from Lubbe the details concerning the Mulford loan until August 31, 1908, which was more than three months after his arrest. No facts are averred showing that they made any effort during that time to ascertain what he knew in reference to the transaction, and no excuse is shown by the complaint for the failure to make such investigation.

The complaint fails to show such diligence on the part of appellant as the law requires. The court correctly sustained the demurrer to the complaint. Judgment affirmed.

LEVENTHAL v. CRAMPTON.

[No. 7,290. Filed June 20, 1911.]

1. **PLEADING.—Amendment.—Effect, on Appeal.**—A pleading that goes out of the record by reason of its amendment cannot be considered for any purpose on appeal. p. 94.
2. **APPEAL.—Briefs.—Omissions.—Answer.—Demurrer.**—No question is presented, on appeal, as to the sufficiency of an answer to which a demurrer was sustained, where neither the answer nor the demurrer, or the substance of either, was set out in appellant's brief. p. 94.
3. **APPEAL.—Assignment of Errors.—Exclusion of Evidence.—New Trial.**—The exclusion of evidence must be made a ground for a new trial in order to present any question thereon on appeal, and cannot be assigned independently. p. 94.
4. **APPEAL.—Briefs.—Waiver.**—Appellant's failure to set out his motion for a new trial in his brief, on appeal, constitutes a waiver of any question thereon, the court being under no duty to search the record for errors. p. 95.
5. **TRIAL.—Exclusion of Evidence.—Offer.**—To save any question on the exclusion of evidence, the offer of proof must precede the ruling upon the objections thereto. p. 95.

Leventhal v. Crampton—48 Ind. App. 92.

6. **APPEAL.—Failure to Point out Error.**—Appellant's failure to point out how he was prejudiced by a ruling of the court constitutes a waiver of the alleged error. p. 95.

From Superior Court of Vigo County; *John E. Cox*, Judge.

Action by Harry C. Crampton against Isaac Leventhal. From a judgment for plaintiff, defendant appeals. *Affirmed.*

H. J. Baker, Charles S. Batt and Hughes & Caldwell, for appellant.

Josiah T. Walker, for appellee.

ADAMS, J.—Action by appellee against appellant to collect a commission alleged to be due to appellee, as a broker, in procuring the exchange of a stock of goods, belonging to appellant, for certain real estate.

Under the head of "What the Issues Were," appellant in his brief makes the following statement: "The complaint was in one paragraph, and alleged that appellee was a broker; that he had been employed by appellant to procure for him a trade for a stock of goods belonging to appellant; that he did much work in securing one willing to trade for said stock, that he brought to appellant Albert C. Barley, with whom appellant entered into a written contract to trade said stock of goods, and that appellee's services were reasonably worth \$400. Appellant answered in two paragraphs. The first was a general denial, and the second alleged fraud and misrepresentation on the part of appellee in procuring appellant to enter into the contract with Albert C. Barley. A demurrer was sustained to said second paragraph of answer, and it was amended and refiled. A demurrer was sustained to said amended second paragraph of answer, and it was again amended and refiled, to which amended second paragraph of answer a demurrer was sustained. The cause was then submitted to a jury for trial, and judgment was rendered against appellant for \$315 and costs."

In addition to the statement just quoted, appellant's brief, by way of recital, shows that a number of instructions were tendered by appellee and given by the court, and that four instructions were tendered by appellant and refused by the court; that appellant filed a motion and reasons for a new trial, which motion was overruled by the court, and time was given in which to file a bill of exceptions. No further statement of the record appears in appellant's brief.

The errors assigned and relied upon for reversal are as follows: The court erred (1) in sustaining appellee's demurrer to appellant's second paragraph of answer; (2) in sustaining the demurrer to appellant's second paragraph of amended answer; (3) in sustaining the demurrer to appellant's further amended second paragraph of answer; (4) in refusing to permit appellant to prove under his general denial all the terms of the contract between appellant and appellee; (5) in overruling appellant's motion for a new trial.

The error predicated upon the sustaining of the demurrer to the second paragraph of answer evidently relates to the demurrer to said paragraph as finally amended. A

1. pleading that goes out of the record by reason of its amendment cannot be considered for any purpose on appeal. Neither this paragraph of answer as amended, nor the demurrer thereto, or the substance of either,
2. is set out or argued in appellant's brief. This specification of error must therefore be deemed to be waived under the rules of this court.

The fourth specification of error—that the court erred in refusing to permit appellant to make certain proof on the trial—does not constitute ground for an inde-

3. pendent assignment of error. Errors of law occurring at the trial must be included in the motion for a new trial.

The fifth specification of error is not available, for the reason that neither the motion for a new trial nor the sub-

stance thereof is set out in appellant's brief. In argument, however, appellant's counsel say that they prof-
4. fered certain material evidence by competent witnesses, and that the court refused to permit such evidence to be introduced, which refusal was assigned as one of the reasons for a new trial. While we are not required to search the record for errors to reverse a case, which appellant has not pointed out, we have in this case examined the record, and find that in each instance the offer to prove was
5. made after the court had ruled upon the objections made to the several questions propounded, and no ruling appears on such offers to prove. Under repeated decisions, no question is presented by a record of this kind. *Gunder v. Tibbits* (1899), 153 Ind. 591; *Standish v. Bridgewater* (1902), 159 Ind. 386; *Shenkenberger v. State* (1900), 154 Ind. 630; *Siple v. State* (1900), 154 Ind. 647; *Whitney v. State* (1900), 154 Ind. 573; *Wilson v. Carrico* (1900), 155 Ind. 570; *Mark v. North* (1900), 155 Ind. 575; *State, ex rel., v. Cox* (1900), 155 Ind. 593; *Chicago, etc., R. Co. v. Linn* (1902), 30 Ind. App. 88; *Farmers, etc., Ins. Co. v. Yetter* (1902), 30 Ind. App. 187.

Counsel, in argument, state that certain instructions tendered by appellee were refused by the court, but
6. how appellant could be injured by such refusal is not disclosed. There was clearly no error in overruling the motion for a new trial.

As this is the only question presented by the brief, the judgment is affirmed.

HALSTEAD ET AL. v. VANDALIA RAILROAD COMPANY.

[No. 7,235. Filed June 20, 1911.]

1. **APPEAL.—Assignments of Errors.—Joint.—Several.—Husband and Wife.**—Where a landowner and his wife jointly and severally assign errors, on appeal, in a condemnation case, whether such joint assignment and the wife's separate assignment present any question will not be determined where the landowner's separate assignment presents all the questions. p. 98.
2. **EMINENT DOMAIN. — Railroads. — Damages.—Instructions.**—In an action for the appropriation by a railroad company of a tract of land including a house, an instruction that "evidence has been permitted * * * as to the value of the walls and foundation of the building * * * and the value of other separate parts of said building, and also of a well on the land," and that "the real question * * * is the fair market value of the improvements taken as a whole, and as they existed on the real estate appropriated" on the day of the filing of the instrument of appropriation, is not prejudicial, where the case was tried, and evidence admitted, on the theory that the damage should cover the depreciation in value of the land and improvements, and where another instruction was given stating that "the measure of damages is the difference in the value of the real estate at the time of the appropriation, and the value of the residue after the strip is taken under the appropriation proceedings," and that "the words 'real estate' include both the land and the improvements thereon." p. 98.
3. **EMINENT DOMAIN.—Damages.—Instruction.—"Should" Consider Evidence.**—In an eminent domain proceeding, an instruction that the jury "should" consider the evidence of the amount paid by the defendant for the real estate in question, along with all the other evidence in the case, in determining the damages, is not erroneous, since it is the duty of the jury to consider all the evidence and give each particular part thereof the weight it deserves. p. 99.
4. **EMINENT DOMAIN.—Damages.—Specific Future Use.**—In an eminent domain case, an instruction that opinions of witnesses as to the damages sustained, based upon the value of the property to the defendants for an intended specific future use "should be disregarded so far as [they are] so based upon the value for an intended specific future use," is correct. p. 100.
5. **EMINENT DOMAIN. — Evidence. — Appraisers' Report.—Instruction Curing Erroneous Admission of.**—In an eminent domain proceeding, an appeal to the circuit court compels a trial of the

case *de novo*, and the admission of evidence showing the amount of the assessment of damages by the appraisers is erroneous, but an instruction that the cause is on trial *de novo* regardless of such appraisement, that the jury has nothing to do with such appraisement, and that "it is not even evidence of any character * * * and [the jury] should not consider it at all," cures such error, especially where the evidence shows that substantial justice has been done. p. 100.

From the Putnam Circuit Court; *Thomas T. Moore*, Special Judge.

Action by the Vandalia Railroad Company against James N. Halstead and another. From a judgment for defendants, they appeal. *Affirmed*.

G. S. Payne, for appellants.

G. A. Knight, John H. James, McNutt, McNutt & Wallace and *John G. Williams*, for appellees.

IBACH, J.—This is an action and statutory proceeding by the Vandalia Railroad Company to condemn and appropriate for a right of way for steam railroad purposes a part of a tract of land in the city of Brazil, Indiana, owned by appellant James N. Halstead.

The complaint asked for the appointment of appraisers to assess the damages, and, after an answer was filed a hearing was had and appraisers were appointed, who filed their report, assessing damages to appellant Halstead in the sum of \$3,100. Appellee filed exceptions to the assessment, on the ground of excessive damages, and prayed that the amount of damages be determined and assessed as in a civil action in the manner and form provided for by law, and upon issues thus formed, the cause was submitted to the jury, who found for appellant Halstead, and assessed his damages at \$2,100.

The errors relied on for reversal are five in number, and arise out of the overruling of the motion for a new trial. They are the giving of instructions seven, twelve and fifteen, tendered by plaintiff, and the admission in evidence

of certain testimony of R. S. Hill and Conrad Dierdorf, who were among the appraisers of damages.

Appellee claims that the joint assignments of error by appellants James N. Halstead and Hattie B. Halstead, and the separate assignments of error by appellant Hattie

1. B. Halstead, raise no question. It is unnecessary for us to decide this, as the separate assignments by appellant James N. Halstead fully present the errors relied upon for reversal.

Instruction fifteen is in the following words: "Evidence has been permitted to go before you as to the value of the walls and foundation of the building in controversy

2. in this case, and the value of other separate parts of said building, and also of a well on the land appropriated by the plaintiff. This evidence has been permitted in order that you may arrive at a just and fair market value of the whole of the improvements on said real estate, and for no other purpose. The real question for your consideration is the fair market value of the improvements taken as a whole, and as they existed on the real estate appropriated on August 4, 1906."

Objection is made to the last clause of this instruction, on the ground that it informs the jury that the only element it is to consider in awarding damages is the value of the improvements; that in assessing the damages it should not allow for the value of the land taken, as well as of the improvements; and that it withdraws from consideration, as an element of damage sustained, the value of the land. We do not think this objection tenable. The case was tried on the theory that appellants were entitled to recover for the value of the land and of the improvements. Almost every witness in his testimony fixed a separate value on the land and the improvements, and in instruction two, given by the court on its own motion, the jury was correctly informed "that the measure of damages is the difference in the value of the real estate at the time of the appropriation, and the value of the

residue after the strip is taken under the appropriation proceedings. The words 'real estate' include both the land and the improvements thereon."

Though instruction fifteen is not very clearly expressed, it seems to us to mean, and we believe that such would be the meaning placed upon it by ordinary men of fair intelligence, that the jury was permitted to consider the value of the improvements taken separately, for the purpose of enabling it to find the fair market value thereof, considered as a whole, not for the purpose of determining the entire damage, but of determining one element of that damage, namely, the value of the improvements. The instruction was clearly applicable to the evidence, and though not complete in itself, when taken in connection with the other instructions given it cannot be held to have misled the jury and harmed appellants.

Instruction seven is as follows: "Evidence has been introduced in this case of the amount paid by defendants for the real estate, a part of which has been condemned by
3. the plaintiff. You should consider such evidence of the purchase price paid by the defendants in connection with all the other evidence in the case in determining the market value of the property condemned."

This instruction is objected to as peremptory, because, by the use of the word "should," instead of "may" or "might," it orders the jury to consider certain evidence which appellants claim they were at liberty to consider, but not bound so to do; and further, as singling out particular evidence for comment. Evidence was introduced of the purchase price paid by appellants for the property shortly before the condemnation. This evidence was proper, and the jury was told that it should consider such evidence in connection with all the evidence in the case. In telling the jury that it should consider the evidence, the judge announced only the duty which it was bound to perform, and as he did not comment on the weight to be given the evidence, he committed

no error in giving the instruction. It is always the duty of a jury trying a cause to take into consideration all the evidence introduced, and it is not error for the court so to instruct, but what weight is to be given any particular part is entirely for the jury. *Deal v. State* (1895), 140 Ind. 354, 368.

Instruction twelve is as follows: "And if the jury finds from any evidence that any witness who has given his opinion as to the market value of the property taken, has
4. based such opinion in part upon the value of such property to the defendants for an intended specific future use, such opinion should be disregarded so far as it is so based upon the value for an intended specific future use."

This instruction was correct. Evidence had been given of the value of the property for an ice-plant, for which purpose appellant Halstead said he intended using it. The jury was correctly advised by the court's instruction eight that the availability of the property for other uses than those to which the land is actually applied, so far as it may be shown in evidence, and the uses for which the property is suitable, and to which it is adapted, may be taken into consideration. But inquiry as to damages cannot go into an intended specific future use, such a field of damages being held to be speculative. *Goodwine v. Evans* (1893), 134 Ind. 262.

In 2 Lewis, Eminent Domain (3d ed.) §709, the rule is announced as follows: "Proof must be limited to showing the present condition of the property and the uses to which it is naturally adapted. It is not competent for the owner to show to what use he intended to put the property, nor what plans he had for its improvement, nor the probable future use of the property. Nothing can be allowed for damages to an intended use." This appears to be the rule recognized by our own Supreme Court.

5. Objection is made to the admission in evidence of the testimony of the witnesses Hill and Dierdorf,

hereafter set forth, on the ground that it brings in evidence before the jury the appraisers' report.

Cross-examination of R. S. Hill is as follows: "Q. Did Mr. Halstead make any statement to you on that occasion about what he would do or was willing to do in regard to that property? A. He did. Q. Tell the jury what it was. A. He said that the salvage, he thought, he would give—that he would give \$1,350. Q. For what? A. For the salvage in that building when it was torn down. Q. Did you take that into consideration in forming your opinion as to the value of the property, and what it ought to be? A. My judgment was that the salvage was worth \$1,000, and I made that part of the estimate. Q. You gave it credit that far? A. For the amount of \$1,000. Q. You say now that your value of that building is how much? What do you say the value is on the building alone? A. I said the value of the building and the ground was \$4,000, and then I deducted from that \$1,000 for the salvage, or the value of the material in the building, which left \$3,000. Q. As a matter of fact you made an appraisalment different from that, didn't you? A. Yes, sir, our appraisalment was— Q. \$3,100? A. That was done in reconciling— Q. \$2,400 for the building and \$700 for the ground? A. If you will allow me to explain the matter—I haven't got the figures. [Here, in answer to questions, witness identified his signature to a paper not named in the record, apparently the appraisers' report.] Q. And here it is stated that the value of the above-described piece of land on August 4, 1906, was \$3,100. I will ask you, Mr. Hill, to tell the jury whether you remember what valuation you put on this building in your report. A. I don't remember the detail—I remember the aggregate was \$3,100."

The following is the redirect examination of Conrad Dierdorf: "Q. Tell the jury whether Mr. Halstead made any statement to you, representing what he would pay for the salvage of the building to the railroad company, when you

were making this examination? A. He did. Q. Tell the jury what statement he made to you. A. He told me that he would give \$1,200 for that building and take it away and tear it down for the material that was in it, and take it, and give the company that much for it.”

The entire purpose of the exception to the award was to obtain a reconsideration of the identical question submitted to and determined by the appraisers chosen for the purpose of fixing the damages to appellants caused by the taking of the land and improvements by appellee. The case, therefore, was to be tried *de novo*, and the award of damages, as made by such appraisers, and included in their report, could not be considered as competent evidence of the proper amount of damages sustained by appellants. This rule is well recognized by the courts of this State. *Trittipo v. Beaver* (1900), 155 Ind. 652, and numerous cases cited. The jury in such cases has but one duty to perform, and that is to assess the damages the defendant will sustain by the appropriation of his land to public use, and has no more right to know what the report or assessment of damages of the appraisers was, or the reasons which influenced that assessment, than any jury in any case has to know what the verdict of a previous jury was in the same case, or the method by which that previous jury arrived at its verdict. On exception to the award and trial *de novo*, the report appealed from is not evidence as to the amount of damages. 2 Lewis, *Eminent Domain* (3d ed.) §669; *Missouri Pac. R. Co. v. Roberts* (1905), 187 Mo. 309, 86 S. W. 91.

Though in the present case the appraisers' report was not admitted in evidence, the amount of the appraisal and some of the reasons influencing the fixing of that amount were brought in by the testimony of the appraisers, and this was error. However, this evidence was brought out by questions which were allowed, as the court informed counsel and the jury at the time, for the purpose of fixing the basis upon which the witnesses fixed their judgment of the value of the

property. The court's instructions two and three, given of its own motion, are as follows: "Said cause is before this court for issue, trial and judgment, *de novo*, regardless of said appraisement, for the purpose of litigating the question of the just compensation due said defendants for said appropriation of said property, as asked in said complaint. You have nothing whatever to do with the action of the court in having heretofore appointed appraisers in this matter. Under the provisions of the statute of the State, in reference to condemnation proceedings, this cause is tried by you as though no such appraisers and viewers had been appointed. You have nothing to do with their appraisement, and you are not at liberty to take into consideration any appraisement that may have been made at that time. It is not even evidence of any character, and is not before you, and you should not consider it at all."

The effect of these instructions was to withdraw the evidence from the consideration of the jury, and we shall presume that the jury was guided by them, in the absence of any showing to the contrary. An instruction to disregard evidence will, as a general rule, cure the error committed by the court in admitting it. Elliott, App. Proc. §701; *Citizens St. R. Co. v. Spahr* (1893), 7 Ind. App. 23; *Taylor v. Wootan* (1891), 1 Ind. App. 188, 50 Am. St. 200.

This court will not reverse a cause where the error committed has been harmless to the one complaining. Such seems to be the case here, and the verdict seems right on the evidence. It was shown that shortly before the condemnation, appellant Halstead had bought two-thirds of the entire property for a consideration which he testifies to as in fact \$1,000, the amount named in the deed, but the vendor testified that the true consideration was \$400. Nine years previously, said appellant had bought one-third of the property for \$350, and during the period while he owned one-third, the building had been rented for about three years, and had returned in rentals scarcely more than the amount of the

taxes. About one-third of the entire tract, including the building, was taken in this proceeding. The building, a three-story brick, forty by sixty feet, had been standing about forty years, and was in bad repair. The values placed upon the property taken varied from \$9,000, by appellant, to \$700, by others, and some of the higher estimates, as brought out by testimony, were based on the value of new material required to construct a similar building. There was varying testimony as to the value of a well which was situated on the land taken. From all the evidence, the result arrived at by the jury seems to be a fair valuation.

The error in admitting the testimony in regard to the appraisers' report seeming to have been harmless to appellant, the judgment is affirmed.

LEONARD v. CITY OF TERRE HAUTE.

[No. 7,242. Filed February 3, 1911. Rehearing denied June 20, 1911.]

1. MUNICIPAL CORPORATIONS.—*Officers.—Fire Chief.—Removal.*—Under §8781 Burns 1908, Acts 1905 p. 219, §160, providing that “every member of the fire and police forces, and all other appointees of the commissioners of public safety, shall hold office until they are removed by the board” and that “they may be removed for any cause other than politics,” after a hearing upon preferred charges, a fire chief of a city of the third class cannot be removed for political reasons. p. 110.
2. MUNICIPAL CORPORATIONS.—*Officers.—Fire Chief.*—Under §8780 Burns 1908, Acts 1905 p. 219, §159, providing that the board of public safety “shall appoint * * * a chief of the fire force and all other officers, members and employes of such fire” force, such chief is a public officer and can be discharged from such office only as the statute directs. p. 110.
3. MUNICIPAL CORPORATIONS.—*Firemen.—Fire Chief.—Salary.—Complaint.*—A complaint in two paragraphs, the first of which alleges that the plaintiff was fire chief of defendant city of the third class, that the board of safety discharged him for political reasons only, and that a certain sum is due to him as salary, the second, alleging that he had been a member of the fire force for twenty years and had never been dismissed and that there

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was due to him a certain sum, is sufficient, such discharge being void, such complaint entitling plaintiff to recover upon one paragraph but not upon both. pp. 110, 114.

4. OFFICERS.—*De Facto*.—*De Jure*.—*Salaries*.—*Quo Warranto*.—Where a *de facto* officer is in possession and performing the duties of an office, the *de jure* officer, to recover the salary, must first establish his right to such office by a *quo warranto* proceeding. p. 112.
5. MUNICIPAL CORPORATIONS.—*Fire Chief*.—*Salary*.—*Answer*.—In an action by a chief of the fire department of a city of the third class for salary as chief and also as a fireman, answers alleging that the plaintiff surrendered and abandoned the position as fire chief and as a fireman are sufficient on demurrer, since they constitute argumentative denials. p. 114.
6. OFFICERS.—*Salary*.—*Performance of Duty*.—The salary of an official position belongs to the officer as an incident to the office and does not depend upon the performance of the duties of such office. p. 114.
7. MUNICIPAL CORPORATIONS.—*Firemen*.—*Salary*.—*Performance of Duty*.—The statute makes provision for the appointment, compensation and removal of city firemen, and since their duties are of a public nature they are so far official that either a chief or a fireman is entitled to his salary as an incident to the position, whether he performs the duties of such position or not. p. 114.
8. PLEADING.—*Rulings*.—*When Harmless*.—Error in overruling a demurrer to a paragraph of answer is harmless, where no evidence was introduced in support of such answer. p. 115.
9. MUNICIPAL CORPORATIONS. — *Firemen*. — *Salaries*. — *Evidence*.—Evidence that the plaintiff was a fire chief in a city of the third class, that the board of safety appointed another, that plaintiff introduced the new appointee and asked to be assigned to duty under him and that he was never so assigned, does not support a verdict for defendant, where one paragraph of complaint alleged that plaintiff was a fire chief and that such board discharged him for political reasons only, and another alleged that he was a fireman and had never been discharged. p. 115.

From Parke Circuit Court; *Gould G. Rheuby*, Judge.

Action by Elias F. Leonard against the City of Terre Haute. From a judgment for defendant, plaintiff appeals. *Reversed*.

White & White and *R. B. Stimson*, for appellant.

Frank S. Rawley, *Howard Maxwell*, *J. S. McFaddin*, *Fred W. Snider* and *P. M. Foley*, for appellee.

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LAIRY, P. J.—Appellant brought an action in the Vigo Circuit Court against the city of Terre Haute. The case was taken on a change of venue to the Parke Circuit Court, where a trial was had, and a judgment rendered in favor of appellee.

The complaint is in two paragraphs, and, omitting the formal parts, is as follows. “(1) Elias F. Leonard complains of the city of Terre Haute, and for cause of action alleges that defendant is a city of the third class, and for more than twenty years has maintained, and still maintains, a paid fire department; that said city has created and maintains a firemen’s pension fund, which fund is made up largely of money deducted from the salaries of the members of said fire department; that on December 5, 1904, plaintiff was appointed by the board of public safety to the office of chief of said fire department, and served in that office until September 4, 1906; that the salary of said chief of said fire department at the time of plaintiff’s appointment to said office as aforesaid, was, and ever since has been, \$100 a month; that out of plaintiff’s salary, as such chief, the usual sums were deducted and paid into said pension fund; that on September 4, 1906, the board of public safety of said city, unlawfully attempted to depose said plaintiff from said office of chief of said fire department, by an order deposing him from said office, which order was made without a hearing, without any notice to plaintiff, and for political reasons only; that on account of said unlawful order of said board, and for no other reason, defendant took plaintiff’s name from the pay-roll of said fire department, and refused and still refuses to pay plaintiff his salary as chief of said fire department; that the salary of said office becomes due and is payable at the end of each calendar month; that the salary accruing to plaintiff as chief of said fire department from August 31, 1906, to December 1, 1906, is due and unpaid, in the principal sum of \$300, with interest on the instalments thereof as they became due. (2) Elias F. Leon-

ard complains of the city of Terre Haute, and for reason of action alleges that the defendant is a city of the third class, and for more than twenty years has maintained and still maintains a paid fire department; that said city has created and maintains a firemen's pension fund, which fund is made up largely of money deducted from the salaries of members of said fire department; that plaintiff is an expert fireman, and for more than twenty years has been and still is a member of said fire department; that the salary of an expert fireman in said department, since June, 1906, has been and still is, \$67.50 a month, which salary becomes due and is payable at the end of each calendar month; that from December 5, 1904, to September 4, 1906, plaintiff acted as chief of said fire department, at a salary of \$100 a month; that on September 4, 1906, the board of public safety of said city made an order deposing plaintiff from acting as chief of said department, which order was made for political reasons only; that no charge has been made against plaintiff as a member or as chief of said department, and no order has been made dismissing plaintiff from said department; that defendant, by reason of said order of the board of public safety of said city deposing plaintiff from acting as chief of said fire department, and for no other reason, has unlawfully stricken plaintiff's name from the pay roll of said department and has refused and still refuses to pay to plaintiff the salary that has accrued to him as an expert fireman of said department from December 3, 1906, which amounts to \$197.75; that the sum now due and unpaid on account of said salary is \$197 principal, and interest on the several instalments of said salary as they became due. Wherefore, plaintiff demands judgment against defendant for \$350, and for all proper relief."

To this complaint appellee filed three paragraphs of answer. The first was a general denial, and the two other paragraphs were as follows: "(2) Comes now the defendant, and for further and second answer to plaintiff's complaint

says: That for a long time prior to September 5, 1904, plaintiff was a member of the fire department of the city of Terre Haute; that on September 5, 1904, he became and was an applicant for the place of chief of the fire department of said city of Terre Haute, and was by the board of public safety of said city duly appointed to the office of chief of the fire department; that on said day said plaintiff duly qualified for, and took possession of, the office of chief of said fire department; that he continued as chief of said fire department until September 3, 1906, when said plaintiff surrendered and abandoned said office to John Kennedy, now chief of said fire department, and has not since said time acted as chief of said fire department, nor attempted to fill the office of chief of said fire department. (3) Comes now the defendant, and for further answer to the second paragraph of plaintiff's complaint says: That for a long time prior to September 5, 1904, plaintiff was a member of the fire department of the city of Terre Haute; that on September 5, 1904, plaintiff was duly appointed chief of the fire department of said city, and continued his duties as said chief until September 3, 1906, when he surrendered and abandoned the office of chief of said fire department, and as a member of said fire department, and has not been a member of said fire department since that time, nor acted in the capacity of a member of said fire department since said time. Wherefore, defendant asks judgment for costs."

After the case was venued to Parke county, appellant filed two paragraphs of supplemental complaint, in the first of which he alleged that since the filing of the first paragraph of the original complaint, and up to the time of the filing of the supplemental complaint, he had continued to be chief of the fire force of the city of Terre Haute; that as such chief his salary had continued to accrue since the filing of the complaint; that the city refused to pay his salary so accrued, and he prayed judgment for such accrued salary. The second paragraph of supplemental complaint was, in substance,

the same as the first, with the exception that it was alleged that the salary that had accrued since the filing of the second paragraph of complaint was the salary due him as a member of the fire force of said city.

Appellee filed three paragraphs of answer to the supplemental complaint, and each paragraph thereof. The first was a general denial; the second stated, in substance, that on September 3, 1906, appellant wholly abandoned and surrendered the office of chief of the fire department of said city, and also at said time wholly abandoned and surrendered the office of member of the fire department of said city, and has not, since said date, acted as chief of said department or as a member thereof. The third stated, in substance, that appellant was, at all times since September 1, 1906, an able-bodied man; that he had made no effort since said date to obtain employment, and that had he done so he could have obtained employment and could have earned \$100 each month since that date.

Appellant replied to the second and third paragraphs of answer to the supplemental complaint. The first and second paragraphs of reply were general denials, and the third paragraph of reply admitted that appellant had performed no services as chief or as a member of said Terre Haute fire department since the order was made by the board of public safety of said city, deposing him as chief of said department, but that he had held himself in readiness to perform said services ever since said order was made, and had been prevented from rendering said services by defendant, its officers and employes.

A separate demurrer to each paragraph of the complaint was overruled, which ruling is assigned in this court as cross-error by appellee. This question will be considered first, for the reason that if neither paragraph of the complaint states a cause of action, the judgment below would necessarily be affirmed.

The appointment and discharge of the officers and mem-

bers of the fire force of cities of the class to which appellee belongs is regulated in this State by statute. Section

1. 8779 Burns 1908, Acts 1907 p. 168, provides for the appointment of a board of public safety. Section 8780 Burns 1908, Acts 1905 p. 219, §159, provides that such board of public safety shall appoint a chief of the fire force, and all other officers, members and employes of such force. Section 8781 Burns 1908, Acts 1905 p. 219, §160, contains the following provision: "Every member of the fire and police forces, and all other appointees of the commissioners of public safety, shall hold office until they are removed by the board." The remainder of the section provides the causes for which, and the proceedings by which, such appointees may be removed.

It is suggested that the first paragraph of the complaint is insufficient, for the reason that the statute under consideration does not apply to the chief of the fire department, so as to prevent his removal from the position as chief of the force, and that a fire chief may be removed from such positions for political reasons, and without conforming to the provisions of the section of the statute as to charges, notice and hearing.

As we construe the statute, we cannot agree with this contention. The chief of the fire force is an office created by the statute, and the board of public safety is em-

2. powered to fill this office by appointment. This officer is one of the appointees of said board, and under the provisions of §8781, *supra*, such board would have no power to remove such appointee, for political reasons, from the position to which he had been appointed, or in any other manner than as provided in said section.

The second paragraph of the complaint proceeds upon the theory that appellant was a member of the fire department of the city of Terre Haute, that he was a member of

3. the force before his appointment as chief of said force, and that by reason of said appointment he did not

cease to be a member of said fire force; that even though the board had a right to remove him as fire chief, such removal would not operate to remove him from the force.

Both paragraphs proceed upon the theory that the action of the board of public safety of said city, in discharging plaintiff without notice or hearing, was absolutely void, and that, notwithstanding the action of said board, he still continued to be a member of the fire force, and also chief of the fire force, by virtue of his former appointment to that office.

It is contended by appellee that both paragraphs are insufficient, for the reason that it appears that the appellant, before the commencement of this action, had been removed from the position as chief of the fire force, and also from the fire department of the city of Terre Haute; that, not being in possession of said office, he could not bring an action for his salary until he had first established his title to said office by an action of *quo warranto*.

This question does not arise upon the demurrer to the complaint. It does not appear from the face of the complaint that the board of public safety had appointed any other person to the office of chief of the fire force, or that any other person was in possession, and discharging the duties, of such office under color of right. The demurrer admits the allegations of the complaint. It admits, therefore, that appellant was appointed, as charged in the first paragraph of complaint, to the position of chief of the fire force by the board of public safety on December 5, 1904, and that on September 4, 1906, the board of public safety of said city attempted to depose him from said office by an order to that effect, made solely for political reasons, and without any notice or hearing. As to the second paragraph of complaint, the demurrer admits the averments that appellant was, at the date of filing his complaint, and has been for more than twenty years, a member of the fire department of the city of Terre Haute, and that no charge had ever been made against him as a member or as chief of said fire depart-

ment, and that no order had been made dismissing him from said department. Under our statutes bearing upon the subject, we hold that the order made by the board of public safety of the city of Terre Haute, by which it was attempted to remove appellant from the position of fire chief, without notice or hearing, was absolutely void, and ineffectual for that purpose. *Roth v. State, ex rel.* (1902), 158 Ind. 242. We also hold that each paragraph of the complaint states facts sufficient to constitute a cause of action. Appellant could not, of course, recover upon both paragraphs of the complaint, but might recover upon one or the other as the facts might warrant.

We recognize the principle of law announced in the line of cases which hold that when a *de facto* officer is in possession of an office, and discharging its duties under

4. color of right, a person claiming to be a *de jure* officer, and as such entitled to the possession of the same office, cannot maintain an action for the salary or fees incident to the office. He must, in such case, first establish the right to the office by a *quo warranto* proceeding. To permit him to sue for the salary of the office, under such circumstances, would be to permit him to try the title to an office in a collateral proceeding to which the person in charge of the office under color of right was not a party. *Hagan v. City of Brooklyn* (1891), 126 N. Y. 643, 27 N. E. 265; *Van Sant v. Atlantic City* (1902), 68 N. J. L. 449, 53 Atl. 701.

The case of *State, ex rel., v. Carr* (1891), 129 Ind. 44, 13 L. R. A. 177, 28 Am. St. 163, is not in conflict with the cases last cited. In that case the relator, in addition to being a *de jure* officer, occupied apartments set apart to him in the Statehouse, and actually discharged the duties of the office during the time the salary sued for accrued. He was, therefore, during said time both a *de jure* and a *de facto* officer, and was permitted to maintain a mandamus proceeding to compel the Auditor of State to issue a warrant for his sal-

ary, notwithstanding the office and its salary had been claimed by another during said time.

The case at bar is similar to the case of *McGee v. State, ex rel.* (1885), 103 Ind. 444, and the same principle applies here. McGee resigned as county superintendent of schools, and the township trustees appointed relator to fill the vacancy. After relator had qualified, he demanded of his predecessor the possession of the books, papers and furniture belonging to the office, and being refused such possession, he brought suit for a writ of mandate to compel his predecessor to turn them over to him. The court said: "Proceedings in *quo warranto* may be resorted to, and are aptly designed for the purpose of trying title to, and in cases of dispute, obtaining possession of an office, and because an ample remedy is thus afforded, mandamus does not lie for the purpose of gaining possession or settling such title. High, Extra. Legal Rem. §49, *et passim*. The application in this case does not proceed upon the theory that there is an existing dispute about the title to or possession of the office. It avers that appellant resigned, and that appellee was duly appointed and qualified in his stead to fill his unexpired term, and that he entered upon the duties of the office. This presents no question of conflicting claims. The question presented related to the refusal of the appellant to turn over the proper records to his successor, and the demurrer in effect admitting that the appellee is his successor, and that the appellant's right is at an end. Admitting that he had resigned, and that the appellee was duly appointed his successor, there was but one thing more required of the appellant, and that was to turn over to him the records and furniture pertaining to the office. Failing to do this, mandamus was the proper remedy. *Johnson v. Smith* [1878], 64 Ind. 275."

In the case at bar, the complaint does not proceed on the theory that there is an existing dispute about the title to or

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the possession of an office. It is not disclosed by the

3. complaint that any person other than appellant had ever been appointed to said office, or that any other person was in possession thereof, or discharging the duties appertaining thereto under color of right. As it does not appear from the pleadings that the title to an office was in dispute between adverse claimants, and as the complaint proceeds upon the theory that appellant was the undisputed claimant to the office, there can be no grounds for holding that under such circumstances he cannot maintain an action for the salary incident thereto.

Demurrers were filed and overruled to the second and third paragraphs of answer to the complaint, and also to the second and third paragraphs of answer to the

5. supplemental complaint. The first and second paragraphs of answer to the complaint, and the second paragraph of answer to the supplemental complaint, contain substantially the same averments, and will be considered together. Each avers, in substance, that appellant, on September 3, 1906, surrendered and abandoned his office of chief of the fire force, and at the same time, he abandoned his position as a member of the force, and that since that time he has not acted as chief or performed any duties as fireman. These answers are good as argumentative denials, and for that reason no prejudicial error was committed in overruling the demurrers thereto. *Kinney v. Dodge* (1885), 101 Ind. 573; *Flanagan v. Reitemier* (1901), 26 Ind. App. 243.

The salary of an official position belongs to the officer occupying such position, as an incident to the office, and does not depend upon his performance of the duties of the

6. office. The statute makes provision for the chief of the fire force. It also provides for his appointment.

7. the manner of fixing his compensation, and the proceedings by which he can be removed. His duties are of a public nature. We therefore conclude that the duties of

the chief of the fire force, or of a member of the department, are so far official in their character, that one holding either position is entitled to draw his salary as an incident to such position, whether he performs the duties of such position or not. *Andrews v. City of Portland* (1887), 79 Me. 484, 10 Atl. 458, 10 Am. St. 280; *Fitzsimmins v. City of Brooklyn* (1886), 102 N. Y. 536, 7 N. E. 787, 55 Am. Rep. 835.

As there was no evidence offered by appellee in support of the third paragraph of answer to the supplemental complaint, and as the evidence of appellee on that sub-

8. ject did not tend to prove any of its allegations, the error of the court, if any, in overruling a demurrer thereto, was harmless.

The only issues of fact that were presented to the court for trial were the issues made upon the first and second paragraphs of the complaint, and the first and second paragraphs of the supplemental complaint, by the answers in general denial thereto; and the only evidence that could be considered by the court in reaching its decision was such as could properly be admitted under the general denial.

The next question to be considered is, Does the evidence, under the issues presented by the pleadings, sustain the decision of the trial court? The evidence introduced

9. by appellant tends to prove every material allegation of the complaint, and this evidence is undisputed, except so far as the evidence tending to show that appellant abandoned his office as fire chief and his position on the fire force may be considered. The evidence on this subject shows, without dispute, that on September 3, 1906, appellant was called to the city hall, where he met Mr. Kennedy, and learned that Kennedy had been appointed chief of the fire force, and that after learning this fact, appellant went with Kennedy and introduced him to the men on the fire force as the new chief; that afterwards, when they arrived at the office, appellant delivered the keys to Kennedy, saluted him as chief, and asked to be assigned to duty. Whether these

facts show an abandonment of the office of chief of the fire force would depend upon whether they were done voluntarily or under coercion. The circumstances of these acts and the acts themselves are of such a nature that one man, fair-minded, intelligent and honest, might reach the conclusion that they were done voluntarily, while another man, equally fair minded, intelligent and honest, might reach a different conclusion. If the judgment below rested only upon the first paragraph of the complaint, we could not disturb it upon the evidence. There was, however, a judgment against appellant upon both paragraphs of complaint, and we find no evidence which proves, or even tends to prove, that he ever abandoned his position as a member of the fire force. There is no evidence that appellant at any time, either by word or conduct, indicated an intention to abandon his position on the force. All his acts and conduct, disclosed by the evidence, indicate the opposite intention. At the time he turned over the keys he reported for duty, and, according to appellant's testimony, he reported for duty several times afterward, the last time being on November 17, 1906, at which time he was told by Kennedy that he would be notified when he (Kennedy) was ready to assign him to duty. So far as Mr. Kennedy testified on the subject, he corroborates appellant, and his testimony is not disputed by any other witness. There is no evidence, which can be considered under the issues as formed, which tends to dispute or contradict the evidence which clearly sustains every material allegation of the second paragraph of complaint.

The judgment of the trial court is reversed, with directions to grant a new trial.

CITY OF HUNTINGTON v. BARTROM, BY NEXT FRIEND.

[No. 7,130. Filed June 21, 1911.]

1. MUNICIPAL CORPORATIONS. — *Negligence. — Streets. — Defective Sidewalks.—Infants.*—A child seven years old is not *sui juris*, nor guilty of contributory negligence, as a matter of law, in failing to avoid stumbling over a stone projecting three-fourths of an inch above the sidewalk, and in any event, a general verdict in its favor is conclusive as to both questions. p. 119.
2. MUNICIPAL CORPORATIONS.—*Defective Sidewalks.—Negligence.*—A city is not guilty of negligence in constructing and maintaining, in a sparsely settled part thereof, a sidewalk with a stone projecting above the surface thereof three-fourths of an inch and which stone is two inches in diameter but slopes from the top to the surface of the sidewalk. pp. 120, 121, 123.
3. MUNICIPAL CORPORATIONS.—*Negligence.—Action.*—In the absence of negligence, no action lies against a city on account of injuries occasioned by a defective sidewalk. p. 121.
4. MUNICIPAL CORPORATIONS. — *Streets. — Care Required. — Frequency of Use.*—Municipal corporations are not insurers of the safety of their streets and sidewalks, but are required to exercise ordinary care to keep them in a reasonably safe condition for travel; and ordinary care varies with the frequency of the use of the streets. p. 121.

From Huntington Circuit Court; *Samuel E. Cook*, Judge.

Action by Paul E. Bartrom, by his next friend, against the City of Huntington. From a judgment for plaintiff, defendant appeals. *Reversed.*

Emmett O. King, John Q. Cline and *Claude Cline*, for appellant.

Lesh & Lesh, for appellee.

HOTTEL, J.—Action for damages by Paul E. Bartrom, by his next friend, Jacob Bartrom, on account of injury alleged to have been sustained by said Paul E. Bartrom, by reason of his stumbling and falling over an alleged protruding stone in one of the sidewalks of said city.

The complaint was in one paragraph, the sufficiency of

which is not questioned by this appeal. An answer in general denial was filed, and the cause was tried by a jury, which returned a general verdict for appellee in the sum of \$250, with which answers to interrogatories were filed.

Upon the conclusion of appellee's evidence, appellant moved that a verdict be directed in its favor, but the motion was overruled. Appellant also filed a motion for judgment on the answers to interrogatories and for a new trial, each of which motions was by the court overruled. Exceptions were properly saved to each of said rulings of the court, and the questions presented by said rulings are now before this court by proper assignments of error.

The answers to interrogatories present the case in the light most favorable to appellant's contention. We quote enough of the interrogatories and the answers thereto, and the substance of others, necessary to a correct understanding of the question presented by the ruling on said motion for judgment thereon. They are as follows: Clark street is one of the public streets of the city of Huntington, and runs south from William street, through a thinly-settled portion of said city. On its east side there was a sidewalk four feet wide, constructed of crushed stone, some of the small stones of which protruded above its general surface at the point where plaintiff was injured. Plaintiff was born October 18, 1899, and his injury complained of occurred October 12, 1906. For some time prior to receiving such injury, plaintiff had been attending school on said William street, during which time he passed over said sidewalk four times each day, and knew "there were some stones sticking up slightly above the general surface of said sidewalk." On said October 12, 1906, plaintiff had good eyesight, was enjoying fairly good health, was all right mentally, and when returning home from school about 4 o'clock p.m. of said day was running over said walk going south, and while so running he fell.

We now quote other interrogatories and answers:

“Q. If plaintiff fell upon or over a stone in said sidewalk, how high did said stone extend above the general surface of said sidewalk?

A. Three-fourths of an inch.

Q. What was the diameter, in inches, of said stone, where it protruded through said sidewalk?

A. Two and one-half inches.

Q. Was said stone rounded, and did it slope down from its highest part to the gravel in the general level of the walk?

A. Yes.

Q. Could plaintiff have seen the stone over which he is alleged to have fallen if he had used ordinary care?

A. Yes.

* * *

Q. What was the distance between the stone, over which plaintiff is alleged to have fallen, and the outer edge of said sidewalk?

A. Eighteen inches.

Q. What was the distance between said stone and the inner line of said walk next to the Balzer lot?

A. Thirty-two inches.

Q. Was there any obstruction in said walk on October 12, 1906, when plaintiff fell, between said stone and either edge of said walk, that would prevent plaintiff from passing around or to the side of this stone?

A. No.

Q. Could plaintiff have seen said stone at said time if he had looked, and stepped over it?

A. Yes.”

Appellant insists that these answers to interrogatories show that Paul E. Bartrom, the injured person, who shall

hereafter be referred to as appellee, was *sui juris*, and,

1. under the law, guilty of negligence contributing to his injury. With this contention we cannot agree.

The finding of the jury shows that the boy lacked a few days of being seven years old, and while it is true, as appellant urges, that the answers to interrogatories show that the protruding stone in the sidewalk over which appellee fell was one that could be seen and avoided as easily by a boy as by an adult, and that appellee in fact knew of the existence of said protruding stone, and by the exercise of ordinary care could have avoided it, yet we think the character of this obstruction was such that it would not be at all likely to appeal to a boy of the age of appellee, as being a danger to be watched and avoided when passing it on the sidewalk. In any event, the questions whether appellee was *sui juris*, and whether he contributed to his own injury, were both questions of fact for the jury, and by its general verdict the jury has settled this question against the contention of appellant, and we cannot say that upon this question there is irreconcilable conflict between such verdict and the answers of the jury to interrogatories. If the weakness of the general verdict rested alone upon this conflict, we should not be disposed to disturb it; but when we consider the conflict between the general verdict and the answers to interrogatories, upon the character of the obstruction over which appellee stumbled and fell, a more serious question arises.

Upon this question the jury found that the walk was made of crushed stone; that it passed through a sparsely settled portion of the city, and that the protruding stone

2. therein, over which appellee fell, was two and a half inches in diameter, and extended above the general surface of said sidewalk three-fourths of an inch. If the answers showed no more than this, we think there would be serious doubt as to appellant's liability, but there is a further and controlling fact found by these answers, viz., that said protruding stone was rounded and sloped down from its highest part to the gravel in the general level of the walk.

In the absence of negligence on the part of a municipal corporation in failing to make or keep its sidewalks in a reasonably safe condition for travel, no action will

3. lie against such corporation for injury sustained by a traveler upon such walks. *City of Michigan City v. Boeckling* (1890), 122 Ind. 39-41; *City of Indianapolis v. Cook* (1884), 99 Ind. 10, 15; *City of Franklin v. Harter* (1891), 127 Ind. 446-448.

A municipal corporation does not warrant nor insure the safety of its streets. The law requires of it only that it exercise ordinary care and skill in making its side-

4. walks, and keeping them in a reasonably safe condition for travel by persons who exercise ordinary care. *City of Michigan City v. Boeckling, supra*; *City of Indianapolis v. Cook, supra*; *City of Franklin v. Harter, supra*.

To hold appellant liable under the answers to interrogatories here made by the jury would be to change the rule heretofore quoted, with reference to the care which

2. the law imposes upon municipal corporations in the matter of keeping their sidewalks ordinarily safe for public travel, from that of ordinary care to one of extraordinary care, almost, if not impossible, of attainment, and would be an inducement and invitation to litigation that would result in expenses and burdens upon such municipalities, far beyond any possible benefit that might, in rare instances, inure to some traveler on the street, unfortunate enough to be injured by an obstruction of the character found by the jury to have been the cause of appellee's fall and injury.

The answers also find that this walk passed through a thinly-settled portion of said city, and the law does not require that a city shall use the same degree of care

4. over such remote walks that are used but little as over those nearer the center of the city and constantly used. We do not mean by this to say that a city shall not

use ordinary care in making and keeping all its sidewalks reasonably safe for public travel, but what would be ordinary care with reference to a seldom-traveled sidewalk in a remote part of the city, either in the construction of the walk in the first instance, and the selection of the material to be used therein, or in the manner of its construction, or its maintenance after construction, might fall short of such degree of care as to a much-traveled walk near the center of such city. "While there is no precise rule to gauge the different degrees of care required for different walks, depending on their locality and amount of use, cities must still be held to a reasonable degree of care and watchfulness over all their walks wherever they may be." *City of Rockford v. Hollenbeck* (1889), 34 Ill. App. 40, 43. See, also, *Fitz v. City of Boston* (1849), 58 Mass. 365, 368, 369.

The complaint in this case charges no negligence on the part of the city in the character of the material used in the original construction of the walk, and the defect or obstruction found by the jury as causing appellee's fall and consequent injury, is no more than might occur in such walks where the ordinary care that the law requires in such cases had been used in maintaining and keeping such sidewalk reasonably safe for travel. Upon the question here involved, the Supreme Court, in the case of *City of Michigan City v. Boeckling, supra*, said: "The basis of the action for an injury sustained because of a defect in a street is the negligence of the municipal corporation in failing to keep the street in a reasonably safe condition for travel. If there is no breach of this duty there is no right of action, and if there is no want of ordinary care there is no breach of duty. A municipal corporation does not warrant the safety of its streets, for its legal obligation is to exercise ordinary care and skill in making and keeping its streets in a reasonably safe condition for travel by persons who exercise ordinary care."

Again, in the case of *City of Indianapolis v. Cook*, *supra*, the Supreme Court said: "A city is not an insurer against accidents upon its streets and sidewalks. It is simply required to keep its streets and sidewalks in a reasonably safe condition for persons traveling in the usual modes by day and night, and using ordinary care. A man may stumble and fall anywhere, in a house or in a street, but, because he happens to fall in the street, it follows by no means that the city is responsible for the injury he receives. There are slight inequalities in sidewalks, and other trifling defects and obstructions against which one may possibly strike his foot and fall, but if injury might be avoided by the use of such care and caution as every reasonably prudent person ought to exercise for his own safety, the city would not be liable." *City of Franklin v. Harter*, *supra*; *Shirts*, Ind. Neg. §1237.

We have found several cases from other states more directly applicable to the facts found by the jury in this case.

One especially in point is the case of *Newton v. City*

2. *of Worcester* (1899), 174 Mass. 181, 188, 54 N. E.

521, in which the court said: "By the evidence, including the photograph used at the trial and shown to us at the argument, here was a brick sidewalk, with some depressions varying *from one-half of an inch to two inches in depth*, 'caused by some of the bricks being depressed and some being elevated.' 'There were no projections or sharp corners,' and 'the surface of the depressions was smooth.' We do not think the jury was warranted in finding upon this evidence that this way when bare was not reasonably safe and convenient for public travel." (Our italics.) See, also, *Raymond v. City of Lowell* (1850), 6 Cush. 524, 53 Am. Dec. 57; *City of Covington v. Manwaring* (1902), 113 Ky. 592, 68 S. W. 625; *Haggerty v. City of Lewiston* (1901), 95 Me. 374, 50 Atl. 55.

We think it clear, under the authorities cited, that the facts found by the jury in this case, as to the size, char-

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acter, etc., of the protruding stone over which appellee fell, shows that if an obstruction, it was not of such a character as to charge appellant with actionable negligence for permitting it to be in the sidewalk, and that the motion for judgment on the answers to interrogatories should have been sustained by the court below. We have carefully examined the evidence in this case, and find that the answers to the interrogatories are supported thereby, and no different result would likely be reached by granting a new trial.

Judgment reversed, with instructions to the court below to render judgment in favor of appellant on the answers to interrogatories.

INDEPENDENT TORPEDO COMPANY v. J. E. CLARK OIL COMPANY.

[No. 7,146. Filed June 21, 1911.]

1. **NEW TRIAL.—***Grounds.—Special Findings.*—Questions relating to the special findings in a case cannot properly be made grounds for a new trial. p. 125.
2. **CONTRACTS.—***Consideration.—Use of Property.*—In an action for the use of an engine, boiler, and drilling machinery, one paragraph of the complaint alleging an agreement by defendant to pay a reasonable compensation for the use of such property, the court finding that defendant had the possession and use thereof for forty-seven days, a sufficient consideration to support the contract is shown. p. 126.
3. **CONTRACTS.—***“Use” of Property.*—In an action by plaintiff for the use of its property by defendant, a judgment for the “use” thereof for the time defendant had the possession thereof was proper, though defendant did not actually use the property during the whole of such time. p. 126.
4. **CONTRACTS.—***Use of Property.—Custom.*—In an action for the use of property for the repair of an oil well after “shooting,” the custom of furnishing such property free before “shooting” has no application. p. 126.
5. **CONTRACTS.—***Varying by Proof of Custom.*—In an action for the agreed reasonable price of property furnished for use in re-

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pairing an oil well, proof of a custom of furnishing the free use of such property is inadmissible. p. 127.

6. EVIDENCE.—*Inadmissible.—Introduction of.—Objecting to Similar.*—The fact that a party made no objection when its opponent introduced incompetent evidence in the former's favor does not estop such party from objecting to similar incompetent evidence offered against it. p. 127.

From Jay Circuit Court; *John F. LaFollette*, Judge.

Action by the J. E. Clark Oil Company against the Independent Torpedo Company. From a judgment for plaintiff, defendant appeals. *Affirmed.*

Orr & Orr, Simmons & Dailey and *R. D. Wheat*, for appellant.

Richard H. Hartford, for appellee.

FELT, P. J.—Appellee, in a complaint of five paragraphs, sued appellant for damages to personal property and for the rental of an engine, boiler, derrick and drilling tools. The court made a special finding of facts, and stated its conclusions of law thereon. The finding was in favor of appellant on the paragraphs seeking to recover damages, and against it on the paragraphs for the use of the property. Judgment was rendered for appellee in the sum of \$1,193.88, from which this appeal is taken.

The appellant assigns as error the overruling of its motion for a new trial, which was asked on the grounds that the amount of recovery is excessive, and that the decision of the court is not sustained by sufficient evidence and is contrary to law.

Other reasons are stated in the motion that relate

1. to the special finding of facts, but these are not properly a part of the motion for a new trial. *Hamrick v. Hoover* (1908), 41 Ind. App. 411; *Scott v. Collier* (1906), 166 Ind. 644.

The complaint alleges and the evidence tends to show that appellant undertook to "shoot" a gas well for appellee, and that in so doing a charge of nitroglycerine was

exploded so near to the surface as to blow out about one hundred fifty feet of the casing of the well, and cause other damage; that appellant obtained from appellee the use of its boiler, engine, derrick and drilling tools, to be used in an effort to repair the damage caused by the explosion; that they were so used, and appellant agreed to pay a reasonable compensation therefor.

Appellant contends that there is no consideration moving from appellee in support of its claim and judgment. One

paragraph of the complaint alleges an agreement to

2. pay a reasonable compensation for the use of the property and a refusal to comply with that agreement. The court found, and the evidence tends to support the finding, that the use of the property was worth \$25 a day, and that appellant had possession and use thereof for forty-seven days. This is sufficient to show a consideration. *Neidefer v. Chastain* (1880), 71 Ind. 363, 36 Am. Rep. 198; *Eisel v. Hayes* (1895), 141 Ind. 41; *Hunt v. Dederick* (1886), 105 Ind. 555; *Starr v. Earle* (1873), 43 Ind. 478.

The contention that use must be limited to days of actual service cannot be sustained. The evidence tends to show

that appellee was anxious to obtain possession of its

3. property, and certainly it was the duty of appellant to return it when through using it. While appellant retained possession, with the right to use the property, and deprived appellee of both possession and use, it cannot rightfully complain of the court's finding. One definition of the word "use," given by Webster, is, applying to one's service, employment, or conversion to some purpose. See, also, 8 Words and Phrases 7226, 7727.

Some contention is made in regard to the custom of furnishing an engine, boiler, derrick, etc., free to those who "shoot" gas and oil wells, but we fail to see its appli-

4. cation here. No claim is made for the use of the property before the premature explosion, and whether, by custom or by agreement, appellant was to have

the free use of the property to “shoot” the well under ordinary conditions, would not control under the extraordinary conditions shown in this case.

Furthermore, there seems to be no ambiguity or uncertainty in the contract alleged and proved. It is a simple agreement to pay a reasonable price for the use of

5. the property. Where the contract is clear and definite in its terms, it will not be varied by a usage or custom. *Leiter v. Emmons* (1898), 20 Ind. App. 22; *Louisville, etc., Packet Co. v. Rogers* (1898), 20 Ind. App. 594; *Lupton v. Nichols* (1902), 28 Ind. App. 539; *Morningstar v. Cunningham* (1887), 110 Ind. 328, 333; *Seavey v. Shurick* (1887), 110 Ind. 494, 497; *Cole v. Leach* (1911), 47 Ind. App. 341; *Hitz v. Warner* (1911), 47 Ind. App. 612. Under the issues and facts of this case, the trial court properly excluded the evidence of a custom or usage.

The fact that one of the parties did not object when the other was proving a custom in his favor, did not deprive him of the right to object when further evidence

6. was offered which was prejudicial to him. The evidence tends to support the judgment. There is no available error shown by the record.

Judgment affirmed.

HALSTEAD ET AL. v. WOODS.

[No. 6,984. Filed June 22, 1911.]

1. TRIAL.—*Interrogatories to Jury.—Submission of, by Court.—*

Under §572 Burns 1908, Acts 1897 p. 128, providing that in all actions tried by a jury, “when requested by either party, the court shall instruct them * * * to find specially upon particular questions of fact to be stated to them in writing in the form of interrogatories on any or all the issues in the cause,” it is not error for the judge to submit, on his own motion, an interrogatory concerning a fact within the issues. p. 129.

2. BILLS AND NOTES.—*Defenses.—Duty of Court to Instruct as to*

Laic.—In an action upon a note, it is the duty of the court to

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instruct the jury as to the law concerning the defenses offered, and as to whether the note as it appears upon its face is governed by the law merchant. p. 131.

3. **BILLS AND NOTES.—Negotiability as Inland Bill.—How Determined.**—Whether a note is governed by the law merchant must be determined from the facts appearing upon the face thereof, unaided by intrinsic evidence. p. 132.
4. **BILLS AND NOTES.—Negotiability.—Essentials.**—A note is not negotiable as an inland bill of exchange unless, upon its face, there is an unconditional promise to pay a certain sum of money, at a fixed time, in a bank of this State. p. 132.
5. **BILLS AND NOTES.—Negotiability.—Payable “at” Bank.—Presumptions.**—A note dated at “Mount Ayr, Indiana,” containing an unconditional promise to pay, at a certain time, a certain sum of money to the payee “at the bank of Mount Ayr,” is governed by the law merchant, the presumption being that such bank is located at “Mount Ayr, Indiana,” where the note was executed, the word “at” being used in the sense of “in.” p. 132.
6. **BILLS AND NOTES.—Place of Payment.—Instructions.—Assuming Facts.**—An instruction that the note in suit was payable at a bank in this State is correct, where the note was executed at “Mount Ayr, Indiana,” and made payable “at the bank of Mount Ayr.” p. 134.
7. **BILLS AND NOTES.—Defenses.—Peremptory Instruction for Plaintiff.**—In an action on a negotiable note, an instruction that the plaintiff was entitled to recover unless the note was materially altered after its execution, is correct, where the plaintiff had testified to facts showing himself to be an innocent purchaser of such note for value, before maturity, and without notice of any defenses thereto, there being no testimony in conflict therewith. p. 134.

From Newton Circuit Court; *Charles W. Hanley*, Judge.

Action by William S. Woods against Everett Halstead and others. From a judgment for plaintiff, defendants appeal. *Affirmed.*

William Darroch, Foltz & Spitler and *George A. Williams*, for appellants.

Hume L. Sammons and *E. B. Sellers*, for appellee.

MYERS, J.—In the court below, appellee, as indorsee, brought this action against appellants to enforce payment of a promissory note for \$1,200, dated at Mount Ayr, Indiana,

March 29, 1904, payable on September 1, 1907, to McLaughlin Brothers, at the Bank of Mount Ayr.

This cause was submitted to a jury for trial upon the complaint, alleging, among other facts, "that the plaintiff holds said note in good faith; that he obtained it before maturity, paid a valuable consideration therefor, and at the time he so paid said consideration and took said assignment he had no notice of any defense thereto on the part of the makers of said note." There was an answer in five paragraphs: (1) A general denial; (2) material alteration of the note sued on after its execution; (3) breach of a written warranty of a certain horse for which the note in suit was given; (4) *non est factum*; (5) failure of consideration. There was a reply in general denial. The jury returned a general verdict in favor of appellee, together with its answer to an interrogatory submitted by the court on its own motion. Judgment was rendered in favor of appellee on the verdict.

Appellants' motion for a new trial was overruled, and this ruling is the only error presented for our consideration. Appellants, in support of this motion, first insist that the court erred in submitting to the jury, over their objection, the following interrogatory: "Did B. B. Miller sign his name to the note in suit on March 29, 1904, at Mount Ayr, Indiana?"

It is claimed that under the act of 1897 (Acts 1897 p. 128, §572 Burns 1908) the court under no circumstances

is authorized to submit interrogatories to the jury

1. unless requested so to do by at least one of the parties to the action. Said act repealed §546 R. S. 1881, which provided for special and general verdicts. By the repealed section the court in all cases, when requested by either party, was required to instruct the jury, if it rendered a general verdict, to find specially upon particular questions of fact to be stated in writing. Under this pro-

vision, on the theory of judicial discretion subject to review, it was held not to be error for the court, on its own motion, to prepare and propound to the jury proper interrogatories to be returned with the general verdict. *Senhenn v. City of Evansville* (1895), 140 Ind. 675. That provision in the old statute thus construed was substantially reenacted in 1897, and under a well-settled rule of construction it will be presumed that the legislature, by reenacting that part of the repealed statute, adopted the construction placed upon it by the courts, unless the contrary is clearly shown by the language of the act. *Board, etc., v. Conner* (1900), 155 Ind. 484; *Brown v. Miller* (1904), 162 Ind. 684. There is no language in the act of 1897, *supra*, from which it can be said that the legislature intended that the trial court should not, on its own motion, submit proper interrogatories to the jury for answer, to be returned with their general verdict. In this case the interrogatory called for a finding of fact within the issues, and the court did not commit error in submitting it.

Appellants also insist that the court erred in giving to the jury certain instructions. Our attention is first called to instructions four and five, given by the court on its own motion. It is argued that instruction four is predicated on §9071 Burns 1908, §5501 R. S. 1881, which makes all written promises negotiable by indorsement, and that instruction five is based on §9076 Burns 1908, §5506 R. S. 1881, and is erroneous, for the reason that no evidence was introduced showing that the note in question was payable in a bank in this State. It is true that the note in suit, although negotiable by indorsement, would not be free from defenses in the hands of appellee under §9071, *supra*. The right of plaintiff to recover under instruction four was not made to depend upon the fact alone that the note was negotiable by indorsement. The jury was told that if it found from all the evidence that the plaintiff was the owner of the note described in the complaint, that he took it before maturity,

in the usual course of business, without notice of facts that impeached its validity between the original parties to the note, or such facts as should have put him on inquiry, then he held the note by a good title, free from all defenses that might have been made by defendants if it had been sued on by McLaughlin Brothers, "and unless there are circumstances which excite suspicion, the purchaser is not bound to make inquiry at the time of the purchase." Instruction five is practically the same as instruction four, except that it told the jury that a promissory note payable in a bank in this State is governed by the law merchant, and that if it found certain facts—practically repeating those mentioned in instruction four—the plaintiff would be entitled to recover, "even though as between defendants and McLaughlin Brothers there existed equities in favor of defendants, unless said note had been materially altered since it was executed."

There was evidence before the jury tending to show that B. B. Miller signed the note as a maker, and that after its execution Miller's name had been removed therefrom. No other alteration is claimed. There was also evidence tending to support the alleged breach of warranty of the horse, and that the consideration for the note had failed. The note itself was introduced in evidence. It had no visible erasure marks, nor was it interlined. It was the duty of

the court to apply the law to the note as it appeared

2. upon its face, and to instruct the jury regarding the defenses urged against it. It was for the court to say whether the note upon its face was governed by the law merchant. *Nipp v. Diskey* (1881), 81 Ind. 214, 42 Am. Rep. 124; *Louthain v. Miller* (1882), 85 Ind. 161. It was in the hands of an indorsee, and as no infirmity appears upon its face, its possession and production raise the presumption that it came into the hands of the holder "in the usual course of business, for value, without notice of any defect in the consideration." *Sondheim v. Gilbert* (1889),

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117 Ind. 71, 5 L. R. A. 432, 10 Am. St. 23; *Citizens Bank v. Leonhart* (1890), 126 Ind. 206; *Fisher v. Fisher* (1888), 113 Ind. 474; *Tescher v. Merea* (1889), 118 Ind. 586.

As the correctness of instructions four and five, and most of the others to which objection is made, depends upon whether the note in suit was negotiable as an inland

3. bill of exchange, it is necessary that we pass upon that question. It is the theory of appellants that it was not, and in support of their contention they insist that as it was payable "at the Bank of Mount Ayr" instead of "in the Bank of Mount Ayr," and it not appearing that the bank named was in Indiana, as required by statute (§9076, *supra*), therefore its place of payment was uncertain. It must be conceded that certainty is required by the law merchant, and uncertainty in any of the essential elements of a note to bring it within that law will destroy its negotiability as an inland bill. Whether the note in question should be given the dignity claimed for it must be determined from the facts appearing upon its face, unaided by extraneous evidence. *Crossan v. May* (1879), 68 Ind. 242, 245.

A promissory note is not negotiable as an inland bill of exchange, unless upon its face it shows that it is an unconditional promise to pay a certain sum of

4. money at a fixed time in a bank of this State. *Gilpin v. People's Bank* (1909), 45 Ind. App. 52. The note in suit, upon its face, is dated at Mount Ayr, Indiana, March 29, 1904, and is an unconditional promise to

5. pay \$1,200, September 1, 1907, "at the bank of Mount Ayr." While the state in which the note is payable is not named in connection with the name of the bank, yet from the fact that it was executed at Mount Ayr, Indiana, and payable "at the bank of Mount Ayr," the conclusion would naturally follow that the bank named was in the town named, in Indiana. In the case of *Walker v. Woollen* (1876), 54 Ind. 164, 166, 23 Am. Rep. 639, it was

said: "A contract, when sued upon in the courts of this State, will be presumed to have been executed in this State, unless the contrary appear." In the case of *Crossan v. May, supra*, referring to the case last cited, it is said: "It was held that where a note was made payable at a named bank, in a place named, but without naming the state, it would be presumed that the bank was in the state, rather than out of it, and that the paper was governed by the law merchant." See, also, *Indianapolis Piano Mfg. Co. v. Caven* (1876), 53 Ind. 258. Ordinarily the word "at" is less definite than the word "in," but as used in the note before us there can be no doubt of, or lack of certainty in, its meaning. It is commonly employed before the name of a bank or place where the holder of a note may find its maker on the day it becomes due. Its sense is determined largely from the subject-matter with reference to which it is used. It may mean "in," and is commonly so understood when it precedes the name of a bank in fixing the place of payment of a promissory note. The note in question was payable "at the bank of Mount Ayr," and no person of common understanding would think of presenting it for payment at any other place than in the room where such bank was actually carrying on its business. The note in this particular meets all the requirements of the law merchant.

In the case of *Crossan v. May, supra*, at page 245, it was said: "In order to place a note upon the footing of bills of exchange, it should show on its face that it is payable *at or in a bank.*" (Our italics.) See, also, *Indianapolis Piano Mfg. Co. v. Caven, supra*. As to the question under consideration, this case is distinguishable from the case of *Hardy v. Brier* (1883), 91 Ind. 91, where the note was made payable "at the bank at Attica, Indiana," and the case of *Butterfield v. Davenport* (1882), 84 Ind. 590, where the note was dated "Concord, June the 5th, 1878," and "payable at the Bank of Goshen," and the case of *Rominer v. Keyes* (1881), 73 Ind. 375, where the note was dated

“Hope, Ind.,” and payable “at the Indiana Banking Company of Indianapolis, Indiana.” In the last case it was held that the note was not governed by the law merchant, because not payable at the office or bank of the Indiana Banking Company.

Appellants insist that instructions one to eight, inclusive, tendered by appellee and given by the court, were erroneous and harmful. As to the first, our attention is called

6. to the part that told the jury that “this note is payable in a bank in this State.” We find no objection to this statement, as no claim is made that the body of the note had been changed in any particular after its execution. The statement was in keeping with the face of the note, and it was not error for the court thus to construe it.

Instruction two is claimed to be erroneous, for the reason that it assumes that plaintiff had made out his case, and was entitled to recover, unless the jury should find

7. that the note had been materially altered after its execution, by the removal therefrom of the name of B. B. Miller. As we have seen, there was evidence tending to support other defenses than the one named in this instruction, all of which would have been available to appellants had the suit been prosecuted by McLaughlin Brothers. But as between appellants and appellee, the latter, by reason of the character of the paper in question, holds it free from such defenses, only in case he took the note before maturity, in the usual course of business, for a valuable consideration, without notice of facts affecting its validity, or of a defense on the part of the makers. *Bradley, Holton & Co. v. Whicker* (1899), 23 Ind. App. 380. These were all essential elements, and all must be proved before it can be said that appellee was a *bona fide* holder, and entitled to the protection of the law as an innocent holder. *Giberson v. Jolley* (1889), 120 Ind. 301. Appellee’s testimony authorized a finding that he was a *bona fide* holder. He was

the only witness who testified on that subject. His testimony was clear and without conflicting statements. He was not contradicted by any other evidence. No facts or circumstances appear in evidence from which the jury might have inferred that appellee was not an innocent purchaser and holder of the note. The testimony of appellee was before the jury only in the form of a deposition, and while the weight of the evidence thus adduced must be left to the jury (*Works v. Stevens* [1881], 76 Ind. 181), there was nothing in it to which our attention has been called, tending to discredit it, or from which the jury might draw reasonable inferences calculated to raise a doubt in the minds of reasonable men as to its truthfulness, other than the fact that he was an interested party. From this state of the record it was not improper for the court to tell the jury the legal effect of facts thus established. *Carver v. Carver* (1884), 97 Ind. 497, 518; *Hazzard v. Citizens State Bank* (1880), 72 Ind. 130; *Forsythe v. City of Hammond* (1895), 142 Ind. 505, 513; *Board, etc., v. Legg* (1887), 110 Ind. 479; *Roberts v. Kendall* (1895), 12 Ind. App. 269; *Hunt v. Conner* (1901), 26 Ind. App. 41. "It is not error to assume in the charge facts established by uncontroverted evidence." 19 Dec. Dig. p. 921. The doctrine thus announced is not in conflict with that class of cases disapproving a peremptory instruction to find in favor of one on whom rests the burden of the issue, when the determination of that issue involves the credibility of witnesses, and inferences and deductions drawn from established facts. *Jacobs v. Jolley* (1902), 29 Ind. App. 25; *Wagner v. Weyhe* (1905), 164 Ind. 177; *Haughton v. Aetna Life Ins. Co.* (1905), 165 Ind. 32. The reasons assigned for declaring this instruction erroneous are not sustained.

What we have said with reference to the objections urged against this instruction, applies with equal force to the specific defects claimed in each of the other instructions. Our investigation of the questions under consideration has

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been strictly limited to the objections and reasons pointed out by appellants, but we do not mean to approve the instructions as against other objections which might be urged against them.

Judgment affirmed.

PRINCETON COAL MINING COMPANY v. DOWNER.

[No. 7,023. Filed February 13, 1911. Rehearing denied May 9, 1911. Transfer denied June 22, 1911.]

1. MASTER AND SERVANT.—*Relation of.—Mines.—Shot Firers.*—A shot firer in a coal mine is a servant of the operator of the mine whether employed directly by such operator, or indirectly, as an assistant to the miners. pp. 141, 143.
2. MASTER AND SERVANT.—*Relationship.—Burden of Proof.—Variance.*—In an action by a coal miner for injuries received, the burden is upon him to show that the relationship of master and servant exists between him and defendant; and he must recover, if at all, upon the cause of action alleged. p. 142.
3. MINES.—*Duties of Inspection.—Reliance upon Performance of.*—It is the common-law and the statutory duty of the operator of a coal mine to inspect the working places of miners and keep them in a reasonably safe condition for the use of servants; and an employe has the right to rely upon the operator's performance of such duty. p. 142.
4. MASTER AND SERVANT.—*Concurrent Negligence of Fellow Servant.—Effect.*—The concurrent negligence of a fellow servant with that of the master in producing an injury to a servant does not relieve the master from liability. p. 142.
5. MASTER AND SERVANT.—*Coal Mines.—Shot Firers.—Defective Partitions.*—A complaint by a shot firer in a coal mine, alleging that the plaintiff was employed by defendant as a servant in its coal mine, that neither the defendant nor its mine boss visited the rooms in the mine at any time, that the pillars between the rooms were negligently permitted to be made less than fifteen feet thick, that defendant knew thereof and plaintiff did not, that a fellow servant, ignorant of such condition of the partition, bored a hole therein, placed and fired a shot therein, to the injury of plaintiff, who was in an adjoining room, and that the defendant employed more than 100 men in such mine, states a cause of action; and another paragraph alleging the same facts except that the plaintiff was elected and employed by the miners with the consent of defendant, and that defendant paid to such

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miners certain sums of money with which to pay the wages of the plaintiff, also states a cause of action. p. 142.

6. **TRIAL.—Peremptory Instructions.**—Where there is some evidence tending to sustain the material allegations of plaintiff's complaint, a peremptory instruction for defendant should be refused. p. 143.
7. **MASTER AND SERVANT.—Coal Mines.—Shot Firers.—Instructions.**—In an action for damages by a shot firer in a coal mine, an instruction that if the miners elected to have plaintiff employed as a shot firer, and contributed to the payment of his wages, such payment being made through appellant, plaintiff was neither a trespasser, nor a mere licensee, in such mine, and that defendant would owe him the duty, while so engaged, to furnish him a reasonably safe place in which to work, is correct. p. 144.
8. **MASTER AND SERVANT.—Coal Mines.—Rooms.—Mining Boss.—Instructions.**—In an action for damages by a shot firer in a coal mine, an instruction that if the jury should find that it was the duty of the mine boss to direct and govern the form and location of the rooms and that it was his duty to make the partition walls fifteen feet thick and he negligently failed to do so, that at the place the shot was fired such wall was only five to seven feet thick, that this was the proximate cause of the injury, that the plaintiff was not guilty of contributory negligence and that the risk was not assumed, the verdict should be for the plaintiff, is a correct statement of the law. p. 144.
9. **MASTER AND SERVANT.—Coal Mines.—Damages.—Issues.—Instructions Concerning.**—In an action by a coal miner for damages for personal injuries, an instruction that the preponderance of the evidence must establish the injury substantially as alleged, and that the injury was caused by the negligence of defendant, but that if the plaintiff was an experienced miner and knew as well as defendant of the danger, he cannot recover, furnishes to defendant no cause for complaint. p. 145.
10. **MASTER AND SERVANT.—Coal Mines.—Shot Firers.—Contributory Negligence.—Assumption of Risk.—Instructions.**—In an action by a shot firer in a coal mine for damages caused by the alleged negligence of the operator of such mine in making the partition walls of the rooms too thin, thereby causing a shot to break through the wall to plaintiff's injury, the elements of contributory negligence and assumption of risk enter, and an instruction thereon is proper. p. 145.
11. **MASTER AND SERVANT.—Coal Mines.—Duties of Boss.—Evidence.**—In an action for damages by a shot firer in a coal mine, evidence is competent showing why pillars of coal were left standing between the rooms therein, what were the duties of the mine boss in respect to such pillars and as to the giving of notice to shot firers of a shot placed for the making of a "break-

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through," and the proper location of the "break-throughs;" and such shot firer, as well as other miners, was a competent witness as to such facts. p. 145.

12. MASTER AND SERVANT.—*Coal Mines.—Blasting.—Evidence.—Jury.*—Evidence that a shot firer was hired by the miners in a coal mine with the operator's knowledge and consent, that while in a room a shot was fired by a miner in an adjoining room, injuring plaintiff because the partition wall was too thin, that it was not the duty of the shot firer to ascertain the thickness of the wall and that he could not have known such thickness except by an examination, and that the miner who fired the shot did not know the thickness thereof, requires a submission to the jury of the questions of defendant's negligence and plaintiff's contributory negligence. p. 146.

From Gibson Circuit Court; *O. M. Welborn*, Judge.

Action by Wallace D. Downer against the Princeton Coal Mining Company. From a judgment for plaintiff for \$1,725, defendant appeals. *Affirmed.*

Lucius C. Embree and *Morton C. Embree*, for appellant.

Marsh T. Lewis and *John W. Brady*, for appellee.

IBACH, J.—Appellee brought this action against appellant to recover for personal injuries received by him while in the employ of appellant, as a shot firer in its coal mine, through the alleged negligence of appellant in failing to provide a safe place in which to work, and through its failure to perform the duties imposed upon it by statute.

The complaint, as originally filed, consisted of three paragraphs, the first of which was dismissed at the trial. The second, omitting the formal parts, as to the nature and organization of the appellant, and the description of appellant's mine, substantially alleges that on October 1, 1907, and prior thereto, appellee was employed by appellant and the miners at work in appellant's said mine, as a shot firer, having been duly elected to said position by the miners of said mine, and prior to and at the time of said election he was employed by appellant as a miner in said mine; that at the time of the injury appellee was firing the shots in a room running in a westerly direction off the second south

cross-entry; that on said date appellee was in the tenth room from the face of said entry; that the safety of the men required that the rooms or excavations running from the entries, and running in the same direction, should run parallel with one another, and that there should be a partition of coal, not less than fifteen feet in thickness, left standing between the rooms, in order to prevent the mine from caving in, and to prevent explosions from shots of powder used in mining coal from injuring employes in the mine; that it was the duty of appellant and its mining boss to plan and lay out the rooms in the mine so that the partitions or pillars of coal between the rooms in the mine should be and remain the thickness aforesaid; that appellant at the time, and for many weeks prior thereto, had in its employ more than one hundred men, and also a mining boss, but that said mining boss did not visit the room in question each alternate day, or any day, nor did he see that safety was assured in said tenth room where appellee was, nor did he prevent appellee from going into the room where he was injured, nor did he or appellant see that the partition between said rooms was of the requisite thickness, but appellant and the mining boss carelessly and negligently refused and omitted to perform any of their said duties; that appellant knew at the time that said partition was dangerously weak and thin, or might have known by the exercise of reasonable care, but with this knowledge assigned one Grubbs to work in the eighth room; that said Grubbs was ignorant of the unsafe and thin condition of said partition of coal, and without experience necessary to ascertain its condition; that while working in said room, in the discharge of his duties, he drilled a hole in said partition at the point where it was so unsafe and of insufficient thickness, and placed powder therein for the purpose of shooting down coal in the usual course of mining it; that by reason of the unsafe condition and thinness of said partition, the explosion of powder broke through said partition

into said tenth room, and threw coal, slate and debris against appellee, inflicting the injuries for which he sues.

It is further averred that appellee, at the time he sustained said injuries, was in the exercise of due care, and had no knowledge whatever of the dangerous condition of the partition of coal between said rooms; that he received said injuries without any fault or negligence on his part, and that said injuries were caused solely by the aforesaid negligence of the appellant.

The third paragraph of complaint is the same as the second, except that in respect to the employing of appellee as a shot firer it alleges that appellee was employed by the miners working in the mine, with the knowledge and consent of appellant, and that appellant paid the miners one-quarter of a cent a ton for each ton of coal mined by them, to be applied by the miners on appellee's wages as a shot firer.

A demurrer for want of facts was overruled to each of said paragraphs, and issues were formed by answer in general denial. A trial was had by jury, resulting in a verdict in favor of appellee for \$1,725. Over appellant's motion for a new trial, judgment was rendered thereon.

The errors assigned and relied on for reversal in this court are (1) the complaint does not state facts sufficient to constitute a cause of action; (2) the court erred in overruling appellant's demurrer to the second paragraph of complaint; (3) the court erred in overruling appellant's demurrer to the third paragraph of complaint; (4) the court erred in overruling appellant's motion for a new trial.

The objections to the second paragraph of complaint are (1) that it does not contain the averment of facts upon which there arises any duty on the part of the master to do the things alleged to have been omitted; (2) it sets forth facts upon which it appears that appellee was not a servant of appellant; (3) that appellee is not shown to have had any right to enter the mine, and to act therein as shot firer;

(4) assuming that appellee was a servant of appellant, and engaged in its service at the time of the injury, still the negligence that caused the injury was that of a fellow servant, whose negligent act which resulted in the injury was open and obvious, and known to appellee before he ignited the shot.

The negligence alleged in each paragraph is twofold: (1) In failing to discharge a common-law duty, and (2) the violation of a mandatory provision of section twelve of the act of April 15, 1905 (Acts 1905 p. 65, §8580 Burns 1908). *Hymera Coal Mining Co. v. Mahan* (1909), 44 Ind. App. 583.

Said second paragraph alleges that appellee was an employe of appellant in its mine, but whether appellee was under the direct employment of appellant, or indirectly as assistant to the miners, can have no bearing on the question, because, in either event, the relation of master and servant existed between appellee and appellant, within the meaning of the rule requiring a master to exercise ordinary care to prevent injury to his employes. *Indiana Iron Co. v. Cray* (1898), 19 Ind. App. 565; *Pugmire v. Oregon, etc., R. Co.* (1907), 33 Utah 27, 92 Pac. 762, 13 L. R. A. (N. S.) 565; *Rummell v. Dilworth, Porter & Co.* (1885), 111 Pa. St. 343, 2 Atl. 355; *Ringue v. Oregon Coal Co.* (1904), 44 Or. 407, 75 Pac. 703; *Ryan v. John O'Brien Boiler Works* (1896), 68 Mo. App. 148.

In the well-considered case of *Ringue v. Oregon Coal Co.*, *supra*, after a review of the authorities, the court said: "Under the law, therefore, even though there was no direct contract of employment, the plaintiff was entitled to the protection of a servant, if, with the knowledge and consent of the defendant, he was in the mine for the purpose of rendering services for its benefit, and the case should have been submitted to the jury upon that theory." In that case the complaint proceeded on the theory that at the time of the accident the relation of master and servant existed be-

tween plaintiff and defendant. This was denied, and was, therefore, a material issue in the case. Any plaintiff

2. must recover, if at all, upon the cause of action as alleged; and the burden was upon appellee to show such a state of facts as, under the law of negligence, would constitute the relation of master and servant. The court further said: "We do not understand, however, that it was necessary for him to prove a direct contract by some authorized agent of the defendant employing him, or that his right to work was included in the terms of the contract with his father. If, as the evidence tended to show, he was going into the mine at the time of the accident by the request of his father, with the permission or consent of the defendant, express or implied, for the purpose of performing work or labor for it, he was not a trespasser or a licensee, but was rightfully in the mine, and the relation of master and servant existed between him and the defendant, within the meaning of the rule requiring a master to exercise reasonable care to prevent injury to his employes."

It was the duty of the mine owner or operator, under both the common and the statutory law, to inspect such working place, and keep it reasonably safe for em-

3. ployes who were required to work therein. And an employe may rely on the presumption that his master has not been negligent in this regard, and that he has performed the duties imposed upon him by his relation-

4. ship. Where a master is guilty of negligence, it is no excuse that a fellow-servant was also negligent.

We are not unmindful of the fact that the bare allegation of a duty, unsupported by facts showing such duty, 5. is a nullity; but we think said second paragraph, when read as a whole, was sufficient to withstand the demurrer.

The same reasons are urged against the third paragraph of complaint. What has been said concerning the sufficiency of the second paragraph applies with equal force to the

third paragraph, and the same authorities there cited will be applicable here.

In addition, it is insisted that said third paragraph alleges that appellee was employed by the miners, and entered the mine as their servant, with the knowledge and consent of appellant, and that appellee was a mere licensee. It is provided by §8610 Burns 1908, Acts 1907 p. 347, §9, "that at any coal mine in the State where the miners working therein so elect, persons may be employed to act as shot firers, and their wages shall be paid by the miners working therein."

It appears from the allegations in this paragraph of complaint that the miners working in the mine of appellant attempted to take advantage of this provision of the law, and elected appellee to such position. The allegations show also that appellant paid certain sums of money to the miners to pay to the person holding the position of shot firer in its mine. Appellee was engaged in performing an indispensable part of the mining operations being carried on in appellant's mine, a part of the business of mining for which the miners were directly employed by appellant. Appellant, with full knowledge of appellee's presence in the mine as shot firer, owed him the same duty it owed to the miners. See authorities heretofore cited. The demurrer was properly overruled.

It is also claimed that the court erred in refusing to give certain instructions requested by appellant. The
6. first instruction was peremptory. The evidence was sufficient to require the cause to be submitted to the jury, and it was properly refused.

The remaining instructions, tendered and refused,
1. are based upon the claim of appellant that appellee was not a servant of appellant, but a mere licensee. Under the authorities, they were properly refused.

Complaint is made of the following instruction given by the court at the request of appellee: "I instruct you, there-

fore, that if you find from the evidence that the
7. miners working in defendant company's mine had
elected to have the plaintiff employed as a shot firer
in said mine, and were contributing of their wages, earned
by mining coal in said mine, to the payment of the wages
of said appellee, as such shot firer, and that defendant com-
pany was holding back portions of the miners' wages, so
contributed to pay the plaintiff as such shot firer, and pay-
ing them over to the treasurer of the miners' local union,
to be paid by such treasurer to plaintiff, then, in that view
of the case, plaintiff was neither a trespasser nor a mere
licensee in defendant's mine, but his employment there was
contemplated and provided for by the law of the State, and
while engaged in the performance of his duties under and
pursuant to such employment, if you find from the evidence
he was so engaged, defendant would owe him the duty to
furnish him a reasonably safe place to perform his duties
as such shot firer in defendant's mine.'" In view of the
authorities cited, the court did not err in giving this in-
struction.

By instruction two, given at the request of appellee, the
jury was told that if it found from the evidence that it was
the duty of the mine boss to direct and govern the
8. form and location of the rooms made in the mine,
and to see that partitions of coal from twelve to fif-
teen feet thick, were left between such rooms, and the mine
boss negligently failed so to direct and govern the form
and location of the rooms referred to in the evidence, but
permitted them to be so driven into the coal, that at the
place where the shot was fired said rooms were separated
by a partition only five to seven feet thick, that this was
the proximate cause of the injury, that plaintiff was not
guilty of negligence proximately contributing to his own
injury, and that the risk was not one of the risks assumed
by appellee, as explained in those instructions, then the
verdict should be for plaintiff. This instruction is a correct

statement of the law, and it was competent to instruct the jury upon this branch of the case.

Instruction four, given at the request of appellee, relates to the duty owing to appellee as shot firer in appellant's mine, and was a correct statement of the law.

Appellant also contends that the court erred in giving, on its own motion, instruction one. Said instruction does not attempt to set out the substance of either paragraph 9. graph, but only a ground of negligence. The jury was told by said instruction that defendant filed a general denial to the complaint; that under the issues thus formed, in order to entitle the plaintiff to a verdict, the evidence should preponderate in his favor, and should establish the injury, substantially as charged in the complaint, and that the injury was caused by the negligence of appellant; but if the proof fairly shows that plaintiff was an experienced miner, and was well acquainted with defendant's mine at the place where he received his injury, and that he knew of the dangerous condition of the wall in controversy, as well as defendant or its mine boss or any of the employes, in that event he is not entitled to recover. This instruction was as favorable to appellant as could have been asked, and while it was crude in form, the court did not err in giving it.

Instructions two and three, given by the court of its own motion, over the objections of appellant, relate to the questions of contributory negligence and the assumption of risk. They were applicable to the evidence in this case, and the court rightfully instructed the jury upon these two branches.

Appellant also contends that the court erred in permitting appellee, as a witness in his own behalf, to testify in respect to the reasons why pillars of coal were left standing between the rooms in a coal mine, and in permitting him to testify as to what were the duties

of a mine boss in respect to these pillars and the thickness thereof, and that it was the duty of the mine boss to give shot firers notice when a shot was being placed for the purpose of making a "break-through" between two rooms in the mine, and also that the court erred in permitting witness Cross to testify that it was the duty of the mine boss to see that the pillars were of a certain thickness at certain places, and to tell where to drive the "break-throughs." These questions were all pertinent to the issues in this case. The witnesses were competent to testify, and the questions related to matters that were material. It was therefore proper to allow the jury to be informed upon matters presented by the questions, to assist it in arriving at a true verdict.

It is insisted by appellant that the verdict is not sustained by sufficient evidence and is contrary to law. It is shown

by the evidence that appellee was hired by the miners
12. in appellant's mine, with the knowledge and consent of appellant; that appellee, on the day of his injury, was engaged in the discharge of his duties as shot firer in appellant's mine; that it was not the duty of the shot firer to investigate the thickness of the pillars; that there was nothing to indicate that this was a "break-through" shot; that it looked like it was to square up the room, and make it a little wider; that if the pillar in question had been fifteen feet thick it would have been perfectly safe; that by the arrangement of the rooms the pillars became thinner as the entries were sunk into the face of the coal; that an experienced man going into these rooms would know that the pillars were getting thinner, but he could not tell whether they were fifteen feet or five feet thick, unless he took the precaution to sound them; that the miner Grubbs, who placed the shot, had no means of determining the thickness of said pillar, and that the shot was a small one.

The question as to the negligence of appellant and the contributory negligence of appellee was properly submitted

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to the jury. There is evidence fairly tending to support the verdict, and appellant's motion for a new trial was properly overruled.

Judgment affirmed.

**BENNETT, ADMINISTRATRIX, v. EVANSVILLE AND
TERRE HAUTE RAILWAY COMPANY ET AL.**

[No. 7,628. Filed June 23, 1911.]

1. MASTER AND SERVANT.—*Railroads.—Employers' Liability Act.*—

A complaint founded upon section one of the employers' liability act (Acts 1893 p. 294, §8017 Burns 1908), providing that "every railroad * * * in this State, shall be liable for damages for personal injury, * * * Second. Where such injury resulted from the negligence of any person in the service of such corporation, to whose order or direction the injured employe at the time of the injury was bound to conform, and did conform," alleging that defendant railroad company's boss of its bridge gang negligently ordered him to help in a specified way to unload piling from a flat car, and that in carrying out such order he was injured, should be held sufficient. p. 148.

2. COURTS.—*Federal.—State.—Superiority.*—The decisions of the federal Supreme Court are binding upon state courts. p. 150.

3. APPEAL.—*Transfer.—Constitutional Questions.—Erroneous Decisions.*—Where a case involves a constitutional law question, and where a ruling precedent of the Supreme Court appears erroneous, the Appellate Court will transfer the case to the Supreme Court with an appropriate recommendation. p. 150.

From Greene Circuit Court; *Charles E. Henderson*, Judge.

Action by Lula Bennett, as administratrix of the estate of Emery C. Bennett, deceased, against the Evansville and Terre Haute Railway Company and another. From a judgment for defendants, plaintiff appeals. (For final decision, see — Ind. —.) *Transferred to Supreme Court.*

W. L. Slinkard, for appellant.

J. E. Iglehart, Edwin Taylor, E. H. Iglehart and John T. & Will H. Hays, for appellees.

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IBACH, J.—Suit by appellant, as administratrix, to recover damages for the death of Emery C. Bennett, which occurred, it is alleged, by reason of the negligence of appellees. Each appellee filed a separate demurrer to the complaint, which demurrers were sustained. Appellant declined to plead further, and judgment was rendered for appellees.

The sole question arising on this appeal is the sufficiency of the complaint, as the only error assigned is in sustaining the demurrers.

The complaint is long and verbose. Following is a brief summary of the facts averred: That Bennett was employed by defendant railroad companies as a member of a
1. bridge gang, whose business it was, among other things, to work upon certain bridges; that he was on July 4, 1907, ordered by defendants, through the boss of the gang with which he was working, to assist in unloading a carload of piling, by rolling them off the car with cant-hooks and crowbars; that all the piling had been unloaded but two pieces, one of which remained on top of the other, on the east side of the car, and both were stuck and fast; that Bennett was ordered by the boss to go to the center of the car, a dangerous place, to the east of the piling, and in front of the way the piling was compelled to roll; that as he was thus situated the piling was, by the orders of the boss, started to roll, that it rolled toward the east, and followed Bennett who was trying to get out of the way; that in trying to escape he jumped from the east side of the car, but the piling rolled off and struck him, and as a result of the injury he died. It is also averred that he had been long employed by defendants as a servant for hire, and was working in the line of his duty when injured.

Appellees are charged with negligence in failing to supply chocks, stops or standards to stop the piling from rolling off the car, and in failing to supply skids on which the piling could slide down from the car. It is alleged that

appellees, by their boss, whose orders and commands Bennett was bound to obey, were negligent in ordering Bennett into a place of danger, in failing to notify him of the danger, in failing to order him therefrom, and in negligently ordering the piling to be pried loose and rolled off the car, in a dangerous manner, while Bennett was thus situated, and that Bennett's death was the result of appellees' negligence. It is averred that Bennett used due care and caution and was without fault or negligence, and that the boss knew that the piling was stuck, and was hard to break loose, and when started would roll off the car with great force, and, knowing these things, ordered Bennett into the dangerous place in front of the piling.

The complaint seems to have been drawn under section one of the employers' liability act. §8017 Burns 1908, Acts 1893 p. 294. This court, in the recent case of *Richey v. Cleveland, etc., R. Co.* (1911), 47 Ind. App. 123, said that "in order to state a cause of action under the second subdivision of the statute, it is necessary that the complaint should state facts which show (1) that the plaintiff was employed by a corporation engaged in the operation of railroads; (2) that the person giving the order or direction was employed by such railroad company, and that the person injured was bound to comply with such order, and did so comply; (3) that the order was a special order, not as broad as the general scope of the employment; (4) either that the order given was a negligent order, or, in the event said order was not negligently given, that while plaintiff was performing his duty in carrying out said order, and while he was in a place where he was required to be in the performance of his duty under said order, he was injured through some negligent act or omission of the person giving the order or direction."

The present complaint would thus seem sufficient. But the Supreme Court of this State has held §8017, *supra*, to be constitutional only so far as it applies to those employes

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of railroad companies who are engaged in operating trains. Appellant, on the facts averred, was not thus engaged. A late decision of the United States Supreme Court (*Louisville, etc., R. Co. v. Melton* [1910], 218 U. S. 36, 30 Sup. Ct. 676, 54 L. Ed. 921), holds that such a statute may apply to all employes of a railroad company, and not violate the equal protection clause of the 14th amendment to the United States Constitution. The decisions of the United

2. States Supreme Court are binding on state courts, and the Appellate Court of this State cannot decide constitutional questions. As the question presented by this case is practically the question presented by the case of *Richey v. Cleveland, etc., R. Co., supra*, upon the

3. authority of that case, and for the reasons there given, we respectfully request the Supreme Court of this State to take over this case and decide it, and that they overrule the cases of *Indianapolis Traction, etc., Co. v. Kinney* (1909), 171 Ind. 612, and *Cleveland, etc., R. Co. v. Foland* (1910), 174 Ind. 411, and follow the ruling in the case of *Indianapolis St. R. Co. v. Kane* (1907), 169 Ind. 25.

This case is transferred to the Supreme Court, under the provisions of §1429 Burns 1908, Acts 1893 p. 29, §3.

WILSON v. JACKSON HILL COAL AND COKE COMPANY.

[No. 7,629. Filed June 23, 1911.]

1. LIMITATION OF ACTIONS.—*Coal Mines.—Mortal Injury to Miner.—Accrual of Right of Action to Widow and Children.—Time of.*—Under §8597 Burns 1908, Acts 1907 p. 253, providing that “for any injury to person or persons * * * occasioned by any violation of this [mining] act, * * * a right of action shall accrue to the party injured * * * and in case of loss of life, by reason of such violation, a right of action shall accrue; first, to the widow, if any”; and if none, then to other dependents, an action by a widow for the negligent killing of her husband in violation of the mining law, brought within two years after his death, is not barred by the statute of limitations, though he lived three years after he sustained the injury, but filed no action therefor. pp. 151, 154.

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2. **STATUTES.—Construction.—In Pari Materia.**—All statutes on the same subject-matter should be construed *in pari materia*; and where a statute is in derogation of the common law no exceptions not contained therein will be allowed. p. 152.
3. **ACTION.—Death.—Abatement and Revival.**—The act of 1907 (Acts 1907 p. 253, §8597 Burns 1908), amending the act of 1905 (Acts 1905 p. 65), providing that for the death of a husband, occasioned by the violation of any of the provisions of said act regulating coal mines, his widow, or children, shall have “a right of action,” creates a new and independent right of action in favor of such wife and children. p. 153.
4. **ABATEMENT.—Action.—Death.—Damages.**—At the common law an action for personal injuries abated with the death of the injured person. p. 153.

From Sullivan Circuit Court; *Charles E. Henderson*, Judge.

Action by Rosa N. Wilson against the Jackson Hill Coal and Coke Company. From a judgment for defendant, plaintiff appeals. *Reversed*.

William L. Slinkard, for appellant.

Bays & Bays, for appellee.

ADAMS, J.—Appellant, as the widow of James P. Wilson, brought this action against appellee for damages accruing to her and her three children, on account of the death of her husband, who, as shown by the averments of the complaint, was injured through the fault and negligence of appellee on October 3, 1904, and survived until March 7, 1907, when, on account of said injuries, he died.

The complaint is in one paragraph, and as no question is raised as to the sufficiency of the allegations of duty, negligence, injury and damages, as set out therein, a more extended statement of the facts averred in the complaint is unnecessary.

The appellee filed its demurrer to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was sustained by the

1. court, and upon appellant's refusing to plead further, and electing to abide by her exception to the ruling

of the court, the judgment was rendered against her for costs.

The only error relied on by appellant for reversal is that the court erred in sustaining appellee's demurrer to appellant's complaint; and the only question argued by either side, in the presentation of this appeal, is whether the action of appellant was barred by the statute of limitations.

Appellee insists that as the complaint shows on its face that appellant's husband lived for more than two years after receiving the injuries complained of, no right of action arose in favor of the widow.

The suit was brought under §8597 Burns 1908, Acts 1907 p. 253, which reads as follows: "For any injury to person or persons or property occasioned by the violation of this act, or any wilful failure to comply with any of its provisions, a right of action against the operator shall accrue to the party injured for the direct injury sustained thereby; and in case of loss of life, by reason of such violation, a right of action shall accrue; first, to the widow," etc.

It is urged by appellee that §8597, *supra*, must be construed in connection with §285 Burns 1908, Acts 1899 p. 405, which is as follows: "When the death of one is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action therefor against the latter, if the former might have maintained an action, had he or she (as the case may be) lived, against the latter for an injury for the same act or omission. The action shall be commenced within two years. The damages cannot exceed ten thousand dollars; and must inure to the exclusive benefit of the widow, or widower (as the case may be), and children, if any, or next of kin, to be distributed in the same manner as personal property of the deceased."

We agree with appellee that all statutes of this State on the subject of death by wrongful act are *in pari ma-*

2. *teria*, and must be construed together. *Elliott v. Brazil Block Coal Co.* (1900), 25 Ind. App. 592. In this

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case it was held that the right of action for death by wrongful act abrogates the common-law rule, and cannot exist in the absence of an express statute; and where a statute confers such right, it will admit of no exceptions not contained therein.

In the case of *Pittsburgh, etc., R. Co. v. Hosea* (1899), 152 Ind. 412, it is held that §285, *supra*, creates a new and independent right of action, and does not continue to

3. the personal representatives of decedent any right or cause of action vested in decedent; that the right provided by said section must rest upon the same wrongful act or omission giving decedent a right of action, and that if the decedent did not nor could not avail himself of it such statute, upon his death from such cause, gives an action for the same cause to his representatives for the use of his widow and children.

It is also established by the case of *Hecht v. Ohio, etc., R. Co.* (1892), 132 Ind. 507, that where the injured party brought suit and recovered damages during his lifetime, including the damages for a disease superinduced by reason of his injuries, and the amount of the judgment was received by the injured party, who afterwards died from causes growing out of his injuries, no cause of action would arise in favor of his personal representatives after his death. There are some decisions out of harmony with this holding, but we think the great weight of authority is with the principle announced in this case. *Dibble v. New York, etc., R. Co.* (1857), 25 Barb. 183; *Whitford v. Panama R. Co.* (1861), 23 N. Y. 465; *Littlewood v. Mayor, etc.* (1882), 89 N. Y. 24, 42 Am. Rep. 271; *Read v. Great Eastern R. Co.* (1868), L. R. 3 Q. B. 555.

None of these cases, however, reaches the point made in this case. Section 285, *supra*, gives a right of action to the personal representatives of decedent, where the de-

4. cedent might have maintained an action for the same act or omission, had he lived. The right to recover

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damages for the negligent act or omission of another is a common-law right in the person injured, but there is no common-law right of action for the death of a human being, the right of action abating upon the death of the party injured, under the maxim *actio personalis moritur cum persona*.

Lord Ellenborough, in the case of *Baker v. Bolton* (1808), 1 Camp. 493, laid down his famous proposition, that “in a civil court, the death of a human being could not be
1. complained of as an injury.” This rule of the common law was so harsh that it was abrogated in England in 1846, by the enactment of what is commonly known as “Lord Campbell’s act,” which, in a more or less modified form, has been enacted in practically all of the states of the Union. The right of personal representatives to maintain an action for the death of a person by the wrongful act or omission of another, was, in the original act, made conditional that the cause of action should be one that the decedent might have maintained had he lived. Our act does not widely differ from the original act, which was early construed in England, and held that the right of action conferred was not the same as that which the decedent would himself have had at common law, had he survived, but was a new and independent action, given by virtue of the statute. *Seward v. Owner of the Vera Cruz* (1884), 10 App. Cas. 59; *Pym v. Great Northern R. Co.* (1863), 4 B. & S. 396.

The Indiana cases have followed this construction, and in *Jeffersonville R. Co. v. Swayne’s Admr.* (1866), 26 Ind. 477, 484, the court said: “The statute does not profess to revive the cause of action for the injury to the deceased in favor of his personal representative, nor is such its legal effect, but it creates a new cause of action, unknown to the common law. The action given by the statute is for causing the death, by a wrongful act or omission, in a case where the deceased might have maintained an action had he lived,

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for an injury by the same act of omission. The right of compensation for the bodily injury of the deceased, which died with him, remains extinct. The right of action created by the statute is founded on a new grievance, namely, causing the death, and is for the injury sustained thereby, by the widow and children, or next of kin of the deceased, for the damages must inure to their exclusive benefit.”

The only question before us is, Does the fact, shown by the complaint, that appellant’s husband lived more than two years after his injury, bar the right of appellant to recover? In passing upon this question, we are not directly aided by any of the cases determined in this State, and must look to the adjudicated cases in other jurisdictions, and these cases are not in entire harmony.

The general principle, as laid down in 8 Am. and Eng. Ency. Law (2d ed.) 877, is that “where the statute follows Lord Campbell’s act, the right of action conferred is for the wrongful death and is based thereon, and the fact that the decedent’s right of action for personal injury had become barred will not affect the right of action conferred by the statute upon his survivors, unless there is some provision in the statute requiring the contrary.”

In the case of *Hoover’s Admx. v. Chesapeake, etc., R. Co.* (1899), 46 W. Va. 268, 33 S. E. 224, the court said: “The first clause of the section, ‘whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action to recover damages in respect thereof,’ plainly relates to the character of the injury, without regard to the question of the time of suit or death. In other words, if the character of injury is such that the injured party could have at any time maintained a suit in relation thereto, his administrator could sue after his death. His cause of action is the negligent injury, but the administrator can have no cause of action until such negligent injury results in

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death. If such were not the case, why not provide merely that the decedent's cause of action survive to his personal representative, without making the death, coupled with the negligence that occasioned it, a new cause of action? And why not give the damages recovered to his estate, instead of exempting them from his debts and liabilities? The second clause of the section, 'then, and in every such case, the person who, or the corporation which, would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured,' does not refer to liability after time of the death of the party, but is descriptive of the person made subject to such liability. Who would have been liable if death had not ensued, means liable at any time prior to the time of death, and not just at that period."

In the case of *Western, etc., R. Co. v. Bass* (1898), 104 Ga. 390, 30 S. E. 874, appellee sought to recover damages for the negligent killing of her husband, who was an engineer in the employ of appellant company. He was injured in 1891 and died in 1896. In that state, as in this, the right of action by decedent, for his own injury, was limited to two years from the date of his injury, and the question of limitation was raised by the defendant on demurrer. After stating the facts, the court said: "It is clear, therefore, that the statute of limitations which began to run against the husband from the date his right of action accrued, namely, the time the injuries were inflicted, could not be pleaded against the plaintiff in a suit for his homicide, alleged to have been caused by the same injuries: because she had no right of action until her husband died, and the statute could not run against a right of action before it came into existence. What we now rule is evidently not in conflict with the adjudications of this court to the effect that, where the widow sues for the homicide of her husband, the defendant may set up any defense which might

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have been pleaded to the merits of the issue, if a suit had been brought by the husband for injuries to his person.”

In *Nestelle v. Northern Pac. R. Co.* (1893), 56 Fed. 261, the action was by the administrator to recover damages for an injury causing the death of his wife. The injury was suffered more than three years before the action was commenced, and it was insisted by defendant that the action was barred by the statute of limitations, and upon that ground a demurrer was filed to the complaint. The court said: “Coming directly to the case in hand, it is to be observed that it is a statutory action, differing from an ordinary action *ex delicto*, in this: that the death of a person, resulting from a wrong, is a necessary element, and until the death of Mrs. Nestelle this cause of action had not accrued in favor of her legal representative. * * * In my opinion it is not material at this stage of the case whether, if a judgment had been rendered during the lifetime of Mrs. Nestelle, in an action for the same injury, it would or would not bar this action. The statute gives an action to the legal representatives of the deceased to recover damages for her death, if the same was caused by the defendant’s negligence, * * * without limiting the time for commencing the same, otherwise than as provided in 2 Hill’s Code §120, which reads as follows: ‘An action for relief not hereinbefore provided for shall be commenced within two years after the cause of action shall have accrued.’ ”

In the case of *Louisville, etc., R. Co. v. Clarke* (1894), 152 U. S. 230, 14 Sup. Ct. 579, 38 L. Ed. 422, the Supreme Court of the United States construed the identical section of the statute under consideration. In that case the injury was received on November 25, 1886, resulting in the death of plaintiff’s decedent on February 23, 1888. The defendant in that case demurred to the complaint, upon the ground that it did not state facts sufficient to constitute a cause of

action, contending that as the death did not occur until after the expiration of a year and a day from the infliction of the injury, such death could not in law be held to have been caused by the act of the defendant. The opinion of the court was delivered by Mr. Justice Harlan, who said: "The statute, in express words, gives the personal representative two years within which to sue. He cannot sue until the cause of action accrues, and the cause of action given by the statute for the exclusive benefit of the widow and children or next of kin cannot accrue until the person injured dies. Until the death of the person injured, the 'new grievance' upon which the action is founded does not exist. To say, therefore, that where the person injured died one year and two days after being injured, no action can be maintained by the personal representative, is to go in the face of the statute, which makes no distinction between cases where death occurs within less than a year and a day from the injury, and where it does not occur until after the expiration of one year and a day. Although the evidence may show, beyond all dispute, that the death was caused by the wrongful act or omission of the defendant, and although the action by the personal representative was brought within two years after the death, yet, according to the argument of learned counsel, the action cannot be maintained if the deceased happened to survive his injuries for a year and a day. We cannot assent to this view. Was the death, in fact, caused by the wrongful act or omission of the defendant? That is the vital inquiry in each case. The statute imposes no other condition upon the right to sue. The court has no authority to impose an additional or different one. If death was so caused, then the personal representative may sue at any time within two years from such death."

This construction of the act is decisive of the question presented by this appeal. If the only condition imposed by the statute upon the right to sue is that death was caused

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by the wrongful act or omission of the appellee, then the court below erred in holding that the action was barred by the operation of the statute of limitations against the decedent in his lifetime.

A case frequently cited in opposition to the view here expressed, is that of *Fowlkes v. Nashville, etc., R. Co.* (1872), 65 Tenn. 829, in which it is held that the cause of action accrues at the time of the wrongful act or omission, and the statute of limitations begins to run at that time. An examination of this case, however, discloses a section of the code of Tennessee that provides that the right of action in a person injured by the wrongful act or omission of another shall not be extinguished by the death of the injured person, but shall pass to his personal representatives for the benefit of his widow and next of kin. Under this statute it is clear that no new cause of action arises upon the death of the injured person, and the case is not in point.

Another case frequently cited, to the same effect and directly in point, is the *Canadian Pac. R. Co. v. Robinson* (1891), 19 Can. Sup. Ct. 292, 54 Am. and Eng. R. Cas. 49, in which it is held that where death ensues from the wrongful act or omission of another, the right of action depends not only on the character of the act from which death ensues, but upon the condition of the decedent's claim at the time of his death. If the claim was in such condition that he could not then have enforced it, had death not ensued, the statute gives to the personal representative no right of action, and creates no liability whatever against the person inflicting the injury. By special leave, an appeal was taken to the House of Lords, where the judgment of the supreme court of Canada was reversed. *Robinson v. Canadian Pac. R. Co.*, [1892] A. C. 481. The holding of the Privy Council was that death is the foundation of the right given by statute, which is governed by the rule of limitation contained therein, and is exempt from the rule of limitation which barred the claim of decedent.

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In view of the authorities herein cited, we are constrained to hold that the trial court erred in sustaining the demurrer to the complaint. The judgment is therefore reversed, with instructions to overrule the demurrer to the complaint, and for further proceedings not inconsistent with this opinion.

Hottel, J., did not participate.

SHUTT ET AL. v. SMITH.

[No. 7,168. Filed June 27, 1911.]

1. **MECHANICS' LIENS.**—*Contractors.*—*Subcontractors.*—Prior to the taking effect of the act of 1909 (Acts 1909 p. 295) a mechanic's lien could not be enforced on behalf of a contractor or subcontractor. p. 161.
2. **COURTS.**—*Decisions.*—*Effect.*—The decisions of the Supreme Court are binding upon the Appellate Court. p. 161.
3. **NEW TRIAL.**—*Excessive Recovery.*—Where the judgment rendered is too large, giving the plaintiff a larger amount than is warranted by the evidence, a motion for a new trial on that ground should be sustained. p. 161.

From Huntington Circuit Court; *Samuel E. Cook*, Judge.

Suit by Edward Smith against Lewis A. Shutt and others. From a decree for plaintiff, defendants appeal. *Reversed.*

C. W. Watkins, for appellants.

Bowers & Feightner, for appellee.

FELT, P. J.—Appellee brought suit against appellants to foreclose a mechanic's lien on certain real estate, and for a personal judgment against appellant Shutt. The court rendered a personal judgment against appellant Shutt for \$338.48, including \$40 attorneys' fees, and gave judgment of foreclosure against all the appellants. From this judgment an appeal was taken, and the errors assigned are the overruling of the separate motion by appellant Shutt for a new trial, the overruling of the separate demurrer of appel-

lant Edward B. Ayres, trustee, and the overruling of the separate demurrer of appellant Shutt to the first paragraph of the complaint; also, that the complaint does not state facts sufficient to constitute a cause of action.

The motion for a new trial alleges that the decision of the court is not sustained by sufficient evidence and is contrary to law, and that the amount of recovery is too large.

Appellants have not complied with the rules of this court by setting out in their brief the substance of the complaint and the demurrer thereto; but enough appears to

1. show that appellee sued, as a subcontractor, to foreclose a mechanic's lien on certain real estate. Under the recent decisions of the Supreme and Appellate Courts, a subcontractor was not entitled to a mechanic's lien under the law in force at the time the lien in suit was filed. *Halstead v. Stahl* (1911), 47 Ind. App. 600; *Overholzer v. Clifton* (1911), 47 Ind. App. 459; *Indianapolis, etc., Traction Co. v. Brennan* (1910), 174 Ind. 1, 30 L. R. A. (N. S.) 85; *Cleveland, etc., R. Co. v. DeFrees* (1909), 173 Ind. 717; *Fleming v. Greener* (1909), 173 Ind. 260; *Korbly v. Loomis* (1909), 172 Ind. 352.

These decisions are binding upon this court, and, following them, we are compelled to hold that the complaint did not state facts sufficient to constitute a cause of action to foreclose the mechanic's lien, and that the court erred in entering a decree of foreclosure.

The complaint is for the foreclosure of a lien upon a particular tract of real estate, and for personal judgment against appellant Shutt for work performed in con-

3. structing buildings thereon. The evidence before us shows that the amount due to appellee for the labor described in the complaint is less than the amount of the judgment. It also appears from the evidence that amounts claimed to be due to appellee from appellant Shutt, on other jobs of work, and for improvements on real estate

other than that described in the complaint, are included in the judgment. Appellee's own testimony shows that there was due to him, on the work described in his complaint, \$347.40, and that he had received of this amount about \$140, leaving a balance due of \$207.40. After accounting for \$40 attorneys' fees, there still appears an excess in the judgment of \$91.08. The amount of recovery is too large, and the motion for a new trial should have been sustained.

The judgment is reversed, with instructions to the lower court to sustain the motion for a new trial, and to permit the parties to amend their pleadings, if they desire so to do, and for further proceedings in accordance with this opinion.

ANDIS v. SMITH.

[No. 7,284. Filed June 27, 1911.]

1. TRIAL.—*Conclusions of Law.—Exceptions.—Time of Taking.—Appeal.—Statutes.*—Section 656 Burns 1908, §626 R. S. 1881, providing that "the party objecting to the decision must except at the time the decision is made," is mandatory, and exceptions taken twenty-one days after conclusions are announced present no question on appeal. p. 163.
2. TRIAL.—*Conclusions of Law.—Amendments.—Exceptions.*—The trial judge, at any time while the action is *in fieri*, may recall and amend the special findings and conclusions of law, and the defeated party may at such time except to such conclusions, whether exceptions had originally been taken or not. p. 165.

From Hancock Circuit Court; *Robert L. Mason*, Judge.

Suit by Morgan Andis against Emanuel Smith. From a judgment for defendant, plaintiff appeals. *Affirmed.*

McCullough & Welborn, for appellant.

Robert Williamson, Charles H. Cook and *W. W. Cook*, for appellee.

ADAMS, J.—This suit was by appellant against appellee, to quiet title to certain real estate in Hancock county. By

request of the parties, made at the proper time, the court made and filed a special finding of facts, established by the evidence in said cause, and stated conclusions of law thereon.

The record before us shows that the evidence was heard on April 14, 1908, and the cause continued for argument of counsel until April 27, 1908. The next entry ap-

1. pearing is as follows: "And afterwards, to wit, on June 6, 1908, being the thirty-sixth judicial day of the April term, 1908, of said court, before the same Honorable Judge, the following further proceedings were had in the cause of Morgan Andis v. Emanuel Smith, No. 11,071: Come the parties and their attorneys aforesaid, and thereupon the court makes and files a special finding of facts and conclusions of law herein, in the words and figures following, to wit: [Here follow the finding of facts and conclusions of law.]" The next entry appearing in the record is as follows: "And afterwards, to wit, on June 27, 1908, being the fifty-fourth judicial day of the April term, 1908, of said court, before the same Honorable Judge, the following further proceedings were had in the cause of Morgan Andis v. Emanuel Smith, No. 11,071: Come the parties herein by their counsel, and thereupon the plaintiff excepts to each of said conclusions of law separately and severally, and also excepts to all of said conclusions of law."

The error relied on by appellant for reversal is that "the court erred in its conclusions of law numbered one and two, and in each of them, stated on his special finding of facts."

It will be observed that the trial court made and filed its finding of facts and conclusions of law on June 6, 1908, and appellant did not except to the conclusions of law until June 27, 1908. Appellee therefore insists that the record does not present any question for the determination of this court on appeal.

Section 656 Burns 1908, §626 R. S. 1881, provides that "the party objecting to the decision must except at the

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time the decision is made.” This statute has been held to be mandatory. *Johnson v. Bell* (1858), 10 Ind. 363; *Coan v. Grimes* (1878), 63 Ind. 21; *Kolle v. Foltz* (1881), 74 Ind. 54; *Dickson v. Rose* (1882), 87 Ind. 103; *Brown v. Ohio, etc., R. Co.* (1893), 135 Ind. 587; *Tecumseh Facing Mills v. Sweet, Dempster & Co.* (1900), 25 Ind. App. 284.

It is also settled by the decisions of the Supreme Court and this court, that, in order to present any question for review on appeal, an exception to the conclusions of law must be taken at the time the decision is made. *Ewbank's Manual* §24; *Elliott, App. Proc.* §793; *Smith v. McKean* (1885), 99 Ind. 101; *Helms v. Wagner* (1885), 102 Ind. 385; *Hull v. Louth* (1887), 109 Ind. 315, 333, 58 Am. Rep. 405; *Matsinger v. Fort* (1889), 118 Ind. 107; *Midland R. Co. v. Dickason* (1892), 130 Ind. 164; *Barner v. Bayless* (1893), 134 Ind. 600; *Radabaugh v. Silvers* (1893), 135 Ind. 605, 607; *Medical College, etc., v. Commingore* (1895), 140 Ind. 296, 297; *Winstandley v. Breyfogle* (1897), 148 Ind. 618; *Chicago, etc., R. Co. v. State, ex rel.* (1902), 159 Ind. 237; *Cooney v. American, etc., Ins. Co.* (1903), 161 Ind. 193; *Repp v. Lesher* (1901), 27 Ind. App. 360.

In the case last cited, the conclusions of law were announced sixteen days before the exception was noted, and this was held to present no question. In the case of *Chicago, etc., R. Co. v. State, ex rel., supra*, six days intervened between the filing of the finding and conclusions and the taking of the exception. This was held to present no question. In the case of *Medical College, etc., v. Commin-gore, supra*, five days after the announcement of the conclusions of law, the exception was taken and held to present no question. In the case of *Radabaugh v. Silvers, supra*, the exception was taken four days after the filing of the conclusions of law, and was held to present no question.

Appellant insists that the rule governing the time of taking exceptions to conclusions of law has been modified

by the later decisions; that the early holdings established the principle, that the filing of the findings of the court was equivalent to the return of a special verdict of a jury, and that after such findings and conclusions thereon had been signed and filed, the court had no further control over them. It is true that the later decisions have changed the rule, and it is now the settled law that the court can recall and amend the findings at the instance of either party, or upon its own motion, at any time while the action remains *in fieri*. *Thompson v. Connecticut Mut. Life Ins. Co.* (1894), 139 Ind. 325, 355; *Royse v. Bourne* (1897), 149 Ind. 187; *Jones v. Mayne* (1900), 154 Ind. 400; *Marion Mfg. Co. v. Harding* (1900), 155 Ind. 648; *Apple v. Smith* (1901), 26 Ind. App. 659.

There can be no doubt about the correctness of the rule stated in the foregoing cases, but we fail to see wherein the latter doctrine enlarges the right of a litigant in a case such as that presented by the record before us. Had the trial court in this case recalled its findings and conclusions, and made any change therein, after they had been signed and filed, appellant would clearly have been entitled to have his exceptions entered at the time of making such change, whether he had excepted to the conclusions as originally filed or not. But that question is not before us. We are not here dealing with a case where any change was made in the facts found or in the conclusions of law after they were signed and filed, but with a case where the court's findings and conclusions were announced, and sixteen days later exceptions were taken to the conclusions of law. That this was too late, is abundantly shown by an unbroken line of decisions, as well as by the plain wording of the statute.

No available error being shown by the record, the judgment is affirmed.

PENNSYLVANIA ELEVATOR AND SUPPLY COMPANY
v. FOSNOTTE.

[No. 7,287. Filed June 27, 1911.]

1. PLEADING.—*Complaint.—Sufficiency.—Initial Attack on Appeal.*—A complaint attacked for the first time on appeal is sufficient if the facts alleged will bar another action for the same cause. p. 168.
2. ACCOUNT.—*Sales.—Complaint.—Sufficiency.—“Sold.”*—A complaint on account alleging that the defendants are “indebted to plaintiff in the sum of \$150, with interest thereon, for hay sold and delivered by plaintiff to said defendants,” and setting out an itemized statement thereof in a bill of particulars, sufficiently shows that a sale was made at the request of defendants, and that a contract was made therefor, the word “sold” importing a contract of sale of some article of value, made upon a valuable consideration, a price paid therefor, and the mutual consent of the parties. p. 168.
3. PLEADING.—*Complaint.—Sufficiency.*—A complaint stating the facts constituting the cause of action in plain and concise language and in such a manner as to enable a person of common understanding to know what is intended, is sufficient. p. 168.
4. APPEAL.—*Considering Evidence.*—The Appellate Court will not weigh conflicting evidence; and in determining whether there is evidence to sustain the judgment below, only that most favorable to appellee will be considered. p. 169.
5. SALES.—*Principal and Agent.—Evidence.*—Evidence that the plaintiff engaged to deliver certain quantities of hay to a person in charge of a stable at the Indiana state fair grounds, such stable having a large sign over the door with defendant’s name thereon, showing that such company dealt in hay and grain, that, later, the general manager of such company drove to plaintiff’s house and doubled the order, that the plaintiff delivered the hay to men at such stable and that he had not been paid therefor, sustains a judgment for plaintiff against such company, whether the sale was made in the name of the company or not. p. 169.
6. APPEAL.—*Briefs.*—Points not argued will not be considered. p. 171.

From Superior Court of Marion County (77,328); P. W. Bartholomew, Judge.

Pennsylvania, etc., Sup. Co. *v.* Fosnotte—48 Ind. App. 166.

Action by Isaac Fosnotte against the Pennsylvania Elevator and Supply Company and another. From a judgment for plaintiff, defendant company appeals. *Affirmed.*

John O. Spahr and *James A. Ross*, for appellant.

Addison C. Harris and *Henry H. Hammer*, for appellee.

IBACH, J.—This was an action filed in the Superior Court of Marion County by Isaac Fosnotte, against appellant and Elmer I. French, on account, for a quantity of hay alleged to have been sold by Fosnotte to said defendants during the month of September, 1908. The complaint is as follows:

“Isaac Fosnotte complains of the Pennsylvania Elevator and Supply Company, a corporation organized and doing business under the laws of the State of Indiana, in said State, and of Elmer I. French, and says that said defendants are jointly and severally indebted to plaintiff in the sum of \$150, with the interest thereon, for hay sold and delivered by plaintiff to said defendants during the month of September, 1908, a bill of particulars of which is filed herewith and made a part hereof, marked exhibit A; that said money is past due and unpaid. Wherefore,” etc.

Exhibit A shows the amount of hay delivered on each respective day, and the value thereof.

To this complaint defendants each filed an answer in general denial. The cause was tried by the court, without the intervention of a jury, and judgment was rendered against both defendants in the sum of \$122.95, from which judgment the Pennsylvania Elevator and Supply Company alone appeals, and assigns as reversible errors that the complaint does not state facts sufficient to constitute a cause of action, and that the court erred in overruling appellant's motion for a new trial. This motion is based on the statutory points that the decision is not sustained by sufficient evidence and is contrary to law.

No demurrer was filed to the complaint, and by appellant's first assignment of error it is attacked for the first

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time in this court. Such being the case, the com-

1. plaint will be held sufficient, if there is no essential allegation wanting, and the facts alleged will bar another action.

The objection made to the complaint by appellant is that it does not contain an averment that the sale was

2. made at the instance and request of defendants, and that it fails to show a contract of any kind.

These points have been fully decided by the courts adversely to appellant in the case of *Curran v. Curran* (1873), 40 Ind. 473, and in the later case of *Radebaugh v. Scanlan* (1908), 41 Ind. App. 109. In the determination of the latter case, this court quoted with approval the following from 2 Kent's Comm. (12th ed.) *468: "A sale is a contract for the transfer of property from one person to another, for a valuable consideration; and three things are requisite to its validity, viz., the thing sold, which is the object of the contract, the price, and the consent of the contracting parties."

The word "sold" signifies a contract of sale of some article of value made between the parties for a valuable consideration. From this it follows, necessarily, that a contract of sale implies an article sold, a price paid therefor, and a mutual consent by the contracting parties.

Section 343 Burns 1908, §338 R. S. 1881, provides that the complaint shall contain "a statement of the facts constituting the cause of action, in plain and concise

3. language, without repetition, and in such manner as to enable a person of common understanding to know what is intended."

The complaint before us, including the itemized statement of account, which is a part of it, substantially complies with the requirements of our code, and a person of

2. common understanding would have no trouble in knowing what was intended. Whether a demurrer to the complaint for want of facts should have been sus-

tained, if presented to the court trying the cause below, we are not called on to decide, but we do now hold it sufficient, since it is attacked for the first time in this court, where the rules of construction are not applied so strictly as where a pleading is attacked by demurrer.

The controlling question presented by this appeal is the sufficiency of the evidence to sustain the finding, and in considering that proposition we shall not weigh the
4. evidence, but shall consider the evidence alone that is most favorable to appellee, and this includes not only the facts that are proved, but also such inferences as may be reasonably deduced from such facts.

We have carefully considered all the evidence in the case; and that most favorable to appellee, and the inferences that we are justified in drawing therefrom, show
5. the following facts: A short time before the opening of the Indiana state fair at Indianapolis, in the year 1908, appellee was a farmer living in Hamilton county, near the Marion county line. He called at a certain stable on the fair grounds, over the main entrance of which was a sign one yard wide and fourteen feet long, containing the following words in large, plain letters: "Pennsylvania Elevator and Supply Company, Hay and Grain." He arranged with a man, later found to be Elmer I. French, "to haul them a load of loose hay each day of the fair, and a load of baled clover." In the building where he first met French was a great deal of straw, and all kinds of hay and corn and oats. Appellee testified that he saw the sign over the door, and negotiated with French for the sale of the hay, and later with a Mr. Gray, the general manager of the Pennsylvania Elevator and Supply Company. After the delivery of the first two loads of hay, said Gray drove to the residence of appellee, about twelve miles distant from Indianapolis, and said to appellee: "We have to have more hay. Instead of one load each day we must have two loads each day." After that, appellee furnished two loads

each day. It also appears from the testimony of the men who delivered the hay, that, when such deliveries were made, both French and Gray were engaged at work about the hay and grain barn, and both gave orders about unloading the hay. Gray assisted one of the witnesses, a driver for appellee, to locate a baler, so that no delay might occur in having the loose hay baled when delivered, and he also requested witness to bring another load the following Monday. After the close of the fair, appellee attempted to locate the parties who bought the hay, and being unable so to do, he placed the account with his attorney, who immediately notified the parties. French called at the office of the lawyer, examined the statement, figured it, and said that the hay was all right, but he doubted whether the last two loads were delivered; that he would see the company and see what the figures were. Gray, who testified that he was the general manager of the appellant, in answer to a telephone call concerning the account, advised the attorney not to be too fast; not to bring suit until he had an opportunity to see French, for the business at the fair grounds had not been profitable.

The evidence showed the amount of hay sold and delivered, the price thereof, and that appellee had not been paid.

The conversation had with Gray, his conduct about the place of business, and his apparent management thereof, show his connection with the purchase of the hay. When these facts are considered in connection with further facts—that a sign of the size and character shown was placed over the main door of the particular place of business advertising the identical business in which his principal was engaged in the city of Indianapolis, and that he was working about the place during the entire week of the fair—we are fully authorized to draw the conclusion that appellee believed, at the time he made the sale and delivery of the hay, that he was dealing with appellant company.

The Supreme Court of this State in determining the case

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of *O. M. Cockrum Co. v. Klein* (1905), 165 Ind. 627, a case very similar to this one, said: "The main question before the jury was the identity of the purchaser. It is not essential to a valid sale that it should be consummated in the name of the real purchaser. If the purchaser is sued for the price and his identity is made out, the contract is not changed by its appearing to have been made by him in the name of another. So, under other facts of this case, if the two-barrel order were made over the signature of O. M. Cockrum, that was by no means conclusive that the sales were made to him."

In the case before us, all the business was transacted with French and Gray. This is by no means conclusive that the sales were made to them individually. When Gray observed the sign of his principal company over the door of his place of business, if it was not appellant's business, that was the time for him to speak, and that was the time for him to notify appellee. And when he assisted in making the purchases from appellee, in the manner the evidence shows he did, his knowledge and his acts, under all the facts proved, became the knowledge of appellant and the acts of appellant, and it must be bound thereby.

The evidence is not in all respects satisfactory, yet it is sufficient to warrant the finding of the lower court.

Appellant also claims that the court erred in permitting appellee to answer a certain question propounded to him.

This claim, however, is not supported by any argument, and we are not called on to consider it; and we do not consider it, for the further reason that counsel say in their brief that "it was no doubt harmless."

No reversible error having been found, the judgment is affirmed.

MORTON v. GAFFIELD.

[No. 7,695. Filed June 27, 1911.]

APPEAL.—Term-Time.—Parties.—In a term-time appeal taken under §679 Burns 1908, §638 R. S. 1881, one of two defendants against whom judgment was taken may appeal without joining his codefendant therein as a party to the assignment of errors.

From Jasper Circuit Court; *C. W. Hanley*, Judge.

Action by William P. Gaffield against James T. Morton and another. From a judgment for plaintiff, defendant James T. Morton appeals. On motion to dismiss the appeal. (For final decision, see — Ind. App. —.) *Motion overruled.*

George A. Williams, for appellant.

Frank Foltz, for appellee.

HOTTEL, J.—Appellee filed a motion to dismiss this appeal, for the reason that appellant had failed to make all the parties against whom judgment was rendered parties to this appeal.

The judgment herein was rendered against appellant, James T. Morton, for \$120, and against George A. Williams, a garnishee codefendant. Appellant has not joined with him, in his appeal, his said garnishee codefendant, and has not named him in his assignment of errors.

This is a term-time appeal, perfected, as such, under §679 Burns 1908, §638 R. S. 1881. Section 675 Burns 1908, Acts 1895 p. 179, §1, provides that “a part of any number of coparties against whom a judgment has been taken” may appeal from such judgment to the Supreme or Appellate Court without making the “coparties not appealing, parties to the appeal, and it shall not be necessary to name them as appellants or appellees in the assignment of errors.” See *Keiser v. Mills* (1904), 162 Ind. 366; *Gunn v. Haworth*

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(1902), 159 Ind. 419; *Baltes Land, etc., Co. v. Sutton* (1903), 32 Ind. App. 14.

The cases cited and relied on by appellee apply to appeals other than term-time appeals.

The motion to dismiss the appeal is therefore overruled.

WELLINGER ET AL. v. CRAWFORD.

[No. 6,791. Filed November 19, 1909. Rehearing denied February 17, 1911. Transfer denied June 27, 1911.]

1. CONTRACTS.—*Oral Modifications.—Commissions for Sales of Real Estate.—Statute of Frauds.—Complaint.*—A complaint alleging that defendants entered into a written contract with the plaintiff to pay to him a certain commission provided he effected a sale of their land for \$5,000, that afterwards such contract was orally modified to provide for the payment of such commission upon a sale of such land for \$4,500, and that the plaintiff so effected a sale at \$4,500, does not state a cause of action, §7463 Burns 1908, Acts 1901 p. 104, §1, requiring all contracts for such commission to be "in writing;" and such provisions cannot be varied or waived by parol. pp. 174, 177.
2. CONTRACTS.—*Vendor and Purchaser.—Options.—Breach.—Complaint.*—Where a landowner gave an option on his land, agreeing in case of actual sale thereof for a certain sum, to give the holder of such option a certain commission, and before the expiration of such option sold such land to another, the holder of such option may maintain an action for damages for the breach thereof; but a complaint therefor must be based upon such breach and not for commissions earned by reason of such sale. p. 177.

From Clark Circuit Court; *Harry C. Montgomery*, Judge.

Action by Thomas F. Crawford against Amelia Wellinger and another. From a judgment for plaintiff, defendants appeal. *Reversed.*

M. Z. Stannard, Jonas G. Howard and Phipps & Kopp, for appellants.

E. C. Hughes and G. H. D. Gibson, for appellee.

RABB, J.—This was an action by appellee to recover a commission, as a real estate agent, for services rendered in finding a purchaser for real estate belonging to appellants, and based upon an alleged written contract between the parties.

The only question presented by the record arises

1. upon the action of the court in overruling appellants' demurrer to the third paragraph of appellee's complaint. The contract, which is the basis of appellants' action, is as follows:

“This is to certify that we, Amelia Wellinger and Joseph Wellinger, her husband, of Clark county, Indiana, do hereby agree and bind ourselves to sell and convey to Thomas F. Crawford, of Clark county, Indiana, for and in consideration of the sum of \$5,000, the following real estate, in Clark county, Indiana, to wit: Being the real estate conveyed by the Coombs heirs to Amelia Wellinger, by deed bearing date of the _____ day of _____, and which deed is found of record in deed record _____, at page _____, of the deed records of Clark county, Indiana, and for a more particular description of said real estate reference is to be made to said deed record. Said Amelia Wellinger and Joseph Wellinger, her husband, hereby agree and bind themselves to execute and deliver to said Thomas F. Crawford a warranty deed to said real estate, and the parties to execute said deed to any person that said Crawford shall authorize and direct, upon tender and payment to the Wellingers by said Crawford of \$5,000, provided that should said Crawford fail to pay said Wellingers the sum of \$5,000 until after the expiration of January 1, 1906, then this writing and obligation shall be void, and said parties shall no longer be obligated to execute said deed. It is further agreed that said Amelia Wellinger shall pay said Thomas F. Crawford a commission of five per cent of the purchase price for the sale of said real estate. Amelia Wellinger. Joseph Wellinger.”

It is averred in the complaint that after the contract was entered into appellee was unable to find a purchaser willing to pay \$5,000 for the premises, and that after appellants re-

ceived information from appellee that he was unable to find a purchaser for the premises at the price named, appellants agreed to waive the provision in said contract that the lands should be sold for \$5,000, and agreed to accept \$4,500 therefor, and to pay plaintiff five per cent of that amount as commission for making the sale, as provided in the contract, and agreed to carry out the terms of the contract, as modified to that extent; that immediately thereafter, and prior to the time fixed in the agreement for the expiration thereof, appellants sold the real estate to a purchaser, procured by appellee, for the sum of \$4,500.

Section one of the act of 1901 (Acts 1901 p. 104, §7463 Burns 1908) provides that no contract for the payment of money as a commission for finding or procuring a purchaser for real estate shall be valid unless it is in writing, and is signed by the owner of the real estate. This act is supplemental to the statute of frauds, and should be construed accordingly. The contract sued on is an executory contract for the sale of land at a stipulated price by the appellants to the appellee. The only stipulation in the contract under which appellee could claim any right to a commission is the clause providing that "Amelia Wagner shall pay said Thomas F. Crawford a commission of five per cent of the purchase price for the sale of said real estate." This clause must be construed in connection with all the other provisions of the contract, and, so construed, the agreement to pay a commission for the sale of the real estate must be held to refer to the complete execution of the executory contract, and the payment to appellants of the contract price of \$5,000. The consideration for which the land was to be sold was a material part of the contract, and a change in the terms of the contract, by which the parties agreed to sell for a different consideration, was such a material variance from the contract as written that no action would lie upon such altered contract, unless the alteration was evidenced by a

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writing signed by the parties sought to be charged. *Carpenter v. Galloway* (1881), 73 Ind. 418; *Lowe v. Turpie* (1897), 147 Ind. 652, 681, 37 L. R. A. 233; *Sprankle v. Truelove* (1899), 22 Ind. App. 577; *Bradley v. Harter* (1901), 156 Ind. 499. Here, the third paragraph of complaint does not aver the performance by appellee of the contract, as it was made, but does aver that a materially different contract was orally entered into, and a recovery is sought upon this oral agreement.

The demurrer should have been sustained.

Judgment reversed, with instructions to the court below to sustain appellants' demurrer to the third paragraph of complaint.

Watson, J., did not take any part in the consideration of this case.

ON PETITION FOR REHEARING.

LAIRY, J.—Appellee makes the point in his petition for rehearing that this court in its original opinion does not accurately state the substance of the complaint. He asserts that the complaint does not aver, as stated in the original opinion, that he was unable to find a purchaser for the premises who was willing to pay \$5,000, and that after appellants received information from appellee that he was unable to find a purchaser for the premises at the price named, appellants agreed to waive the provisions in said contract that the lands should be sold for \$5,000; but that the complaint on this subject alleges that appellee did attempt to sell said land for said \$5,000, and did spend much time and money in an effort to sell said lands at said price; that the best offer he could obtain for said land was \$4,500, which offer was made by Clarence and Gertrude Spencer; that appellee thereupon advised appellants that \$4,500 was the best offer he had so far obtained for said land, but advised that a better offer might be obtained later on.

Considering the complaint as a whole, we think that the

substance of its material averments was properly stated in the original opinion. The complaint was construed

1. by the court on the theory that it was based on the contract, and sought to recover a commission earned under said contract. So construed, the complaint could not be sufficient, unless it showed that appellee had performed the contract on his part, by obtaining a purchaser for the property in accordance with the terms of said contract. The complaint discloses that the land was sold for \$4,500, and, in order to show that this was a compliance with the contract, the complaint makes the following averments: "That thereupon, and after receiving said information from said plaintiff, said defendants agreed to waive, and did waive, the provision in said contract that the land should be sold for \$5,000, and agreed to let said price stand in said contract at \$4,500, and agreed to accept the sum of \$4,500 for said real estate." The original opinion correctly holds that such a condition in a contract, required under the statute of frauds to be in writing, cannot be waived or modified by parol. *City of Michigan City v. Leeds* (1900), 24 Ind. App. 271; *Carpenter v. Galloway* (1881), 73 Ind. 418; *Goss v. Nugent* (1833), 5 Barn. & Ad. 58; Browne, Stat. of Frauds (4th ed.) §411.

Appellee urges that his complaint shows that he had a contract which gave him the exclusive right to sell, at any time before January 1, 1906, the real estate described

2. therein for \$5,000, and that appellants sold the premises for \$4,500 on February 25, 1905, without the consent of appellee. These averments would tend to show a breach of the contract by appellants. If appellants conveyed the land to another before the time covered by appellee's option had expired, and thereby disabled themselves from performing the contract on their part, this would amount to a breach of the contract, and would give rise to an action in favor of appellee for such breach. To be good

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upon the theory of a breach of contract, the complaint should aver facts which show that, by reason of said breach, appellants prevented appellee from purchasing the property himself, or selling it to another within the time provided in said contract and in accordance with its terms, and that appellee was thereby prevented from earning the commission provided in the contract. It is not averred in the complaint that appellee could and would have purchased the real estate, or that he could have sold it to another at the price and within the time specified in the contract. It does not appear from any averment of the complaint that appellee was damaged by said breach, as it does not appear that appellee could have earned the commission, even though appellants had not broken their contract by conveying the land. The complaint does not proceed on the theory of a breach of the contract, and seek to recover damages resulting therefrom; and, if it did, it would be clearly insufficient upon that theory, for the reasons stated.

The complaint clearly seeks to enforce the written contract as modified. It is insufficient upon this theory, for the reasons stated in the original opinion.

The petition for rehearing is overruled.

SNYDER ET AL. v. GREENDALE LAND COMPANY.

[No. 7,006. Filed May 20, 1910. Rehearing denied December 6, 1910. Transfer denied June 27, 1911.]

1. **DEEDS.—Wills.—Estates.—Life.—Fee.—Words of Inheritance.—“Heirs.”—“Heirs of the Body.”**—Where an estate is limited to a person for life and by the same instrument the remainder is limited, either mediately or immediately, to his “heirs,” or the “heirs of his body,” the first taker takes a fee simple, or a fee tail, “heirs,” or “heirs of the body,” being words of limitation and not of purchase. p. 183.
2. **WILLS.—Deeds.—Testamentary Disposition of Property.**—Where deeds are made to children and placed in the hands of another to be delivered at the death of the grantor, and such

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grantor in his will directs that such deeds be delivered as directed, the deeds being made a part of the will by reference, the deeds and the will will be construed together as constituting a testamentary disposition of such property. p. 183.

3. **DEEDS.—Wills.—Estates.—Life.—Fee Simple.**—Deeds granting certain land to each of the grantor's daughters "for and during the term of her natural life, and upon her demise to the children of said [daughter] and their descendants who may be alive at the time of the death of said [daughter], their heirs and assigns forever," when construed with a will making such deeds a part thereof by reference and confirming them, giving such land to each of such daughters and her "descendants," if any of such daughters are dead, and with a memorandum reciting the conveyance of such lands to each of such daughters "for life, with remainder to (her) children," the devise of a life estate to testator's wife of all lands not conveyed to such daughters and their "descendants," and the devise of the residue of testator's property to such daughters, the children of any one deceased to receive her part, gives to each daughter a life estate in such lands, remainder in fee simple to her children living and the descendants of those that are dead at the time of such daughter's death, such estate vesting at the death of the testator and the acceptance of the deed. pp. 183, 185.
4. **WILLS.—Construction.—Intent.**—The purpose in construing a will is to ascertain the testator's intent. p. 184.
5. **WILLS.—Construction.—Words.**—"Descendants."—"Issue."—In construing a will, the word "descendants" is sometimes used in a restricted sense; and the word "issue," which is coëxtensive with the word "descendants" and includes every degree thereof, may import children only. p. 184.

From Dearborn Circuit Court; *George E. Downey*, Judge.

Suit by the Greendale Land Company against Bertha Snyder and others. From a decree for plaintiff, defendants appeal. *Affirmed.*

W. J. Beckett, T. S. Cravens and *B. K. & W. F. Elliott*, for appellants.

Warren N. Hauck, Edwin F. McCabe and *James McCabe*, for appellee.

COMSTOCK, J.—Appellee instituted this suit against appellants to quiet title to certain real estate in Dearborn county, Indiana. Issues were formed by a complaint in two

paragraphs—to each of which a demurrer for want of facts was overruled—and an answer in general denial. The cause was tried by the court, and upon request a special finding of facts was made, and conclusions of law were stated thereon.

In brief, the facts as shown by the special findings, so far as material here, are that appellee is an Indiana corporation; that Joseph Hayes, a resident of Dearborn county, Indiana, died testate on February 3, 1875, the owner and in possession of certain real estate in said county; that said Hayes executed his last will and testament on January 16, 1875; that said will (a copy of which is set out) was duly probated and recorded; that Nancy Hayes was testator's surviving widow; that she died intestate on May 17, 1875; that she possessed and had the use of said real estate from the death of Joseph Hayes until her death; that on January 11, 1875, said Joseph and Nancy Hayes caused to be drafted, signed and duly acknowledged a deed of conveyance of the real estate described in the complaint to their daughter, Priscilla Garrison, and to her children and their descendants; that said Hayes placed said deed in the hands of John Schwartz for safe-keeping, with directions to said Schwartz to deliver said deed to said Priscilla Garrison; that said deed was so kept until after the death of Joseph Hayes, when it was delivered to, and accepted by, said Priscilla Garrison, and placed of record in the proper records of Dearborn county, Indiana, on February 20, 1875; that said deed was the deed mentioned in item three of the will of said Joseph Hayes, as set out in the special finding, and that said Schwartz was the John Schwartz mentioned in the will; that said Priscilla Garrison entered into the possession of said real estate, and continued to occupy it until November 15, 1901, when she and her husband, Lewis Garrison, Sr., one of the defendants, and all the surviving children of said Priscilla Garrison, except her son Calvin Suit, who had conveyed his interest to one of the grantors named therein, executed a warranty deed to William H. O'Brien for the real

estate described in the complaint; that after a succession of transferees said property was conveyed by warranty deed to appellee, Greendale Land Company, and that it has ever since been in possession thereof; that at the death of said Joseph Hayes, said Priscilla had no children, excepting certain of the defendants in this suit and a son, Charles Suit, since deceased; that said Charles Suit died intestate, unmarried, on September 25, 1876; that at the date of the death of said Priscilla Garrison's father, she had no children married; that at the date of her death she left certain grandchildren and certain great-grandchildren surviving her.

Upon the facts found the court states its conclusions of law as follows: "That plaintiff is the owner, in fee, of the real estate described in the complaint, and that as against defendants and each of them it is entitled to have its title thereto quieted."

Appellants separately and severally excepted to said conclusions of law, and filed their separate and several motions for a new trial, which were overruled, and a decree was entered in accordance with the conclusions of law stated.

The questions raised render it pertinent to set out a part of the language of the will and the deed in controversy. Said will reads, in part, as follows:

"Item 3. Whereas I (Joseph Hayes) and my wife, Nancy Hayes, conveyed to each of our children and the descendants of such as are dead certain portions of my real estate, * * * for the purpose of making division among my heirs of the principal part of my real estate, * * * which were and are intended for immediate delivery to them and for recording thereof and are now in the hands of John Schwartz for delivery to the parties and for safe-keeping until delivered, I therefore now here will, that whatever lands I have so conveyed and delivered the deed therefor to said John Swartz for safe-keeping and delivery to the grantees as aforesaid, shall be their respective portions * * * of my real estate, * * * and I hereby make these deeds by reference to them a part of this my will, and have also added to the clause partial memoranda."

Here is added memoranda of the lands conveyed to certain parties named therein. Each memorandum recites:

“Memoranda of the lands conveyed by my deed to _____ for life, with remainder to (her) children. * *
* “Item 4. I give * * * to my beloved wife, Nancy Hayes, if she survives, for and during the term of her natural life, all of my real estate not deeded to our children and their descendants, as in item three set forth.
* * * Item 6. I give and bequeath all such residue as may be left by my wife [after all expenses and debts are paid] to all my children and the descendants of such as may be dead (they to receive the parts respectively which their parents would have received if alive), to be distributed equally between them.”

The language of said deed is, in part, as follows:

“This indenture made January 11, 1875, witnesseth that, in consideration, * * * we, Joseph Hayes and his wife, Nancy Hayes, of Dearborn county, Indiana, do hereby * * * convey unto said Priscilla Garrison for and during the time of her natural life, and upon her demise to the children of said Priscilla Garrison and their descendants who may be alive at the time of the death of said Priscilla Garrison, their heirs and assigns forever the following described real estate,” etc.

Appellants insist that the language of the deed, before set out, gives to appellants, who are the grandchildren and great-grandchildren of said Priscilla Garrison, and who were alive at the time of her death, an equal share with the children as grantees and members of the same class; that the language is plain and unambiguous, leaving no room for construction; that the words “heirs” and “descendants” are not equivalent terms. On the other hand it is contended by appellee that the word “and” in the words “and their descendants,” means “or;” that the word “descendants” as used here means the issue of a deceased child or children of Priscilla Garrison, and is a word of limitation and not of purchase; that the deed and the will must be construed together.

Where a freehold is limited to one for life, and by the

same instrument the inheritance is limited, either mediately or immediately, to heirs of the body, the first taker

1. takes the whole estate either in fee simple or fee tail; and “heirs,” or “heirs of the body,” are words of limitation and not of purchase. This is a well-settled proposition of law in this State. *McIlhinny v. McIlhinny* (1894), 137 Ind. 411, 24 L. R. A. 489, 45 Am. St. 186, and cases cited.

In the case of *Smith v. Smith* (1885), 24 S. C. 304, the court, in construing a like provision, said: “As we understand it, the principle is that where the remainder is given to the very persons who would without such remainder take by descent from the life tenant, they shall be held to take by descent, and not by purchase.”

There is no finding as to when the deed was placed in the hands of Schwartz. It was in his possession when the will was executed. Both instruments were made in con-

2. templation of death. The donor was distributing his estate in his own way.

In the case of *Mortgage Trust Co. v. Moore* (1898), 150 Ind. 465, a deed was made a part of the will by reference, and it was held that the instruments should be construed together. At the time of the execution of the will the deed had not been accepted.

None of the children of Priscilla was married, and, at the time the deed was made, had no descendants. The language of the deed is:

“Convey unto said Priscilla Garrison for and during the time of her natural life, and upon her demise to the children of said Priscilla Garrison and their descendants who may be alive at the time of the death of said Priscilla Garrison, their heirs and assigns forever.”

The deed gave a life estate to the daughter Priscilla, with remainder in fee to the children of said Priscilla and their descendants living at the date of the death of said

3. Priscilla. Item three of the will recites the conveyances to which reference has been made, using the

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terms, “and the descendants of such as are dead.” Item six devises the remainder of the land given to his wife for life, and to all of his children “and the descendants of such as may be dead (they to receive the part respectively which their parents would have received if alive).” Following this, the will provides for withholding certain advancements that had been made. In the provision in reference to advancements, it is provided that where children to whom the testator had made the advancements were dead, the advancement made to the parent should be deducted from the share of the children.

These provisions in the deed and will, considered together, make the conclusion clear that it was the purpose of the testator to give his living children an equal share of his estate, and to give to the children of those who were dead the portion that would have gone to the parent if living. The

purpose in construing a will is to ascertain the inten-

4. tion of the testator, and to carry it out so far as it may not interfere with the established rules of law.

Fowler v. Duhme (1896), 143 Ind. 248; *Burton v. Carnahan* (1906), 38 Ind. App. 612. The broad import of the term

“descendants” is sometimes narrowed, when there is

5. a ground for judging that it was intended in a restricted sense. Thus the word “issue,” which is coëxtensive with “descendants,” and includes every degree (*Davenport v. Hanbury* [1796], 3 Ves. *257; *Freeman v. Parsley* [1797], 3 Ves. *421; *Oddie v. Woodford* [1821], 3 Myl. & Cr. [14 Eng. Ch.] *584; *Bernal v. Bernal* [1838], 3 Myl. & Cr. [14 Eng. Ch.] *559), has been restrained to the sense of “children.” *Horsepool v. Watson* (1797), 3 Ves. *383; *Farrant v. Nichols* (1846), 9 Beav. 327; *Edwards v. Edwards* (1849), 12 Beav. 97; *Swift v. Swift* (1836), 8 Simons 168; *Goldie v. Greaves* (1844), 14 Simons (37 Eng. Ch.) *348. In *Sibley v. Perry* (1802), 7 Ves. *522, the gift was to J. R. and M., if living, but in the event of death “the lawful issue of every one of them shall equally have and

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enjoy the share which their respective parents, if living, would have had;" and Lord Eldon held that, as the

3. word parent meant father or mother, the correlative term issue meant children." In the case at bar, said item six gives the property referred to

"to all my children and the descendants of such as may be dead (they to receive the parts respectively which their parents would have received if alive), to be distributed equally between them share and share alike as soon as said residue is converted into money," etc.

This provision is qualified by the limitation that the descendants are to receive the parts that their parents would have received if living. From these provisions we may reasonably conclude that the testator intended to regard each deceased child as a stock of descent, and while using the word "descendant" in the sense of children or descendants of children, still had regard for representation. It would be unreasonable to suppose that the testator intended that the children of a deceased child should take coëxtensive with the child. The use of the term "descendants" as correlative of "parents" is sufficient to restrain the general import of the word "descendants," so that grandchildren, whose parents were living, could not take with their parents. This construction lets in children to equal shares, and the grandchildren to the share their parents would have taken if living. On the testator's death and the acceptance of the deed, the estate became vested in the children then living and the descendants of those then dead, *per stirpes*. But as there were none dead, the estate vested in the children.

Judgment affirmed.

STATE LIFE INSURANCE COMPANY v. JONES.

[No. 7,062. Filed November 1, 1910. Rehearing denied December 30, 1910. Transfer denied June 27, 1911.]

1. INSURANCE.—*Policies.—Voidable.—Election.—Rescission.—Return of Consideration.*—The so-called void clauses of an insurance policy render such policy voidable, in case of a breach thereof, at the election of the insurer; and in order to rescind such contract the insurer must return the benefits received. p. 187.
2. COURTS.—*Supreme.—Appellate.*—The Appellate Court is bound by the rules of law announced by the Supreme Court. p. 188.

From Shelby Circuit Court; *Will M. Sparks*, Judge.

Action by Marguerite Jane Jones against the State Life Insurance Company. From a judgment for plaintiff, defendant appeals. *Affirmed.*

Charles F. Coffin, Carter & Morrison and H. S. McMichael, for appellant.

Wickens & Osborn and Alonzo Blair, for appellee.

RABB, J.—This action was brought by appellee against appellant to recover upon two policies of insurance issued by it upon the life of her husband, naming appellee as the beneficiary therein. No question is presented as to the sufficiency of the complaint. Appellant answered that the policies sued on were issued in consideration, among other things, of the warranties and statements contained in the insured's application for the policies; that said warranties were broken; that the statements in the application were false and fraudulent; that appellant relied upon the truth of the statements made by the insured in answer to the interrogatories addressed to the insured in the medical examination, which was contained in said application, and that appellant was induced thereby to enter into the contract.

It is not averred in the answer that appellant, upon the

discovery of the untruthfulness of said answers, paid or offered to pay appellee, or any one representing the insured, the premiums received by it for the policies, and it appears from the special finding of facts and from the evidence that no such tender was made.

Appellant's defense proceeds upon the theory that no such tender was necessary; that no question of rescission of the contract was involved; that this defense is predicated upon the terms of the contract as made by the parties, and not upon its rescission; that upon the facts averred in the answer and shown by the evidence and special finding, nothing was due to the appellee under the contract, and therefore no steps were required to be taken for its rescission.

It is conceded by appellant that the rule is correct as settled by the decision of this court in the cases of *American Cent. Life Ins. Co. v. Rosenstein* (1910), 46 Ind. App.

1. 537, *Farmers, etc., Ins. Co. v. Hill* (1910), 45 Ind. App. 605, *United States, etc., Ins. Co. v. Clark* (1908), 41 Ind. App. 345, *Modern Woodmen, etc., v. Vincent* (1907), 40 Ind. App. 711, *Aetna Life Ins. Co. v. Bockting* (1907), 39 Ind. App. 586, and by the Supreme Court in the case of *Glens Falls Ins. Co. v. Michael* (1907), 167 Ind. 659, 8 L. R. A. (N. S.) 708, to the effect that contracts of insurance are not rendered absolutely void by a breach of warranty, or by reason of false representations contained in the application of the character involved in this case, but that the policies are voidable at the election of the insurer, and that before a defense on such ground can prevail against a suit upon the policy, proper steps must be taken by the insurer to rescind the contract, and that a tender back of the premiums received by it is one of the necessary steps; but the soundness of these decisions is vigorously assailed, and appellant insists that they should be overruled.

If this court were convinced that appellant is right in its contention, it could not revoke the rule established by these

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cases until the Supreme Court overruled its decision

2. in the case of *Glens Falls Ins. Co. v. Michael, supra*.

We must therefore consider the law as settled in this State.

Judgment of the court below affirmed.

EPPERT, EXECUTOR, v. GARDNER.

[No. 7,701. Filed January 10, 1911. Rehearing denied March 7, 1911. Transfer denied June 27, 1911.]

1. **WORK AND LABOR.—Decedents' Estates.—Parent and Child.—Services.—Complaint.—Another Action Pending.**—A complaint alleging that the plaintiff after she was twenty-one years old, was induced to care for her mother and father during the remainder of their lives by the promise of her father that he would will to her the homestead, that accordingly she performed such services, that her father so executed his will, but that shortly prior to his death he destroyed it and executed another, leaving such property to another, and demanding the value of her services, is sufficient; and the objection that another action was pending for the same cause is not sustained, where the complaint does not show such fact. p. 190.
2. **PLEADING.—Plea in Abatement.—How Questioned on Appeal.**—A plea in abatement can be questioned on appeal only where a demurrer is filed thereto and exception reserved to the ruling thereon. p. 191.
3. **APPEAL.—Briefs.**—Points not argued will not be considered. p. 191.
4. **WORK AND LABOR.—Parent and Child.**—A daughter who, after arriving at the age of twenty-one years, works for her parents, under a contract, express or implied, can recover therefor. p. 192.
5. **WORK AND LABOR.—Parent and Child.—Services.—Jury.—Appeal.**—Evidence tending to show that the plaintiff, after she became twenty-one years old, and at the request of her father, remained at home and cared for her mother and him until they died, in pursuance of a promise by him to will to her the homestead, supports a verdict in her favor for the value of the services, the father failing to provide for her as agreed in the will; and such verdict is conclusive on appeal. p. 193.
6. **WORK AND LABOR.—Parent and Child.—Promise of Compensation.—Presumptions.**—A promise by a parent to compensate his

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child for services to be performed rebuts the legal presumption that such services are gratuitously performed. p. 193.

7. TRIAL.—*Instructions.—Peremptory.*—Where there is some evidence tending to support the material allegations of plaintiff's complaint, a peremptory instruction for defendant is improper. p. 193.
8. TRIAL.—*Instructions.—How Considered.*—Instructions should be considered as a whole, and when they fairly place the case before the jury, reversible error cannot be predicated thereon. p. 194.
9. TRIAL.—*Instructions.—Refusal to Give.—Predication of Error Upon.*—Reversible error cannot be predicated upon the court's refusal to give instructions requested unless it is specifically pointed out by appellant in what manner such instructions were relevant to the issues and that they were warranted by the evidence. p. 194.
10. WORK AND LABOR.—*Executors.—Claims.—Evidence.—Decedent's Declarations.*—In an action by a daughter against the executor of her father's will for services rendered under his alleged promise to pay therefor, declarations by such father, against the interests of the daughter, and in her absence, are not admissible, being self-serving. p. 194.
11. WORK AND LABOR.—*Executors and Administrators.—Evidence.—Declarations of Party.*—In an action by a daughter for services rendered to her father under his alleged promise to pay therefor, evidence of the father's declarations as to his intention of holding an insanity inquest on such daughter is inadmissible. p. 195.

From Probate Court of Marion County (9,413); *Frank B. Ross*, Judge.

Action by Nancy C. Gardner against Fred W. Eppert, as executor of the last will of Francis M. Eppert, deceased. From a judgment for plaintiff, defendant appeals. *Affirmed.*

Barrett & Barrett and Denny, Bowen, & Denny, for appellant.

Henry Clay Allen, for appellee.

IBACH, J.—Appellee instituted this action against appellant, as executor of the estate of Francis M. Eppert, deceased, for services rendered to decedent and his wife from

August 1, 1894, to May 26, 1898, and for the decedent alone from May 26, 1898, to April 7, 1907.

It is alleged in the complaint that the services were rendered under an agreement made with Francis M. Eppert, appellee's father, wherein it was agreed that after appellee became twenty-one years of age she was to remain with her father and mother, keep house for them, nurse and care for them, and that in consideration of her so doing said Francis M. Eppert would execute a will, devising to her in fee simple the home in which they lived; that he did execute such will, making therein such provision for her; that she saw such will, and was induced thereby to remain at home and care for her parents; that for more than twelve years she performed the services required of her; that, in consideration of said agreement, she advanced to decedent, for repairs on said property, \$50. She also says that he preserved the will for a period of time, but that shortly before his death he destroyed it, and executed another, wherein he wholly failed to will the property, or any part thereof, to her, and that therefore the estate is indebted to her in the sum of \$6,680.

Appellant made some preliminary motions that were disposed of by the trial court, after which he filed his answer in two paragraphs; the first of which was a general denial, and the second a plea of payment. For reply to appellant's second paragraph of answer, appellee filed a general denial. The jury upon the trial found for appellee, and she obtained a judgment for \$2,500.

The errors assigned by appellant are that the court erred (1) in overruling appellant's demurrer to appellee's complaint, and (2) in overruling appellant's motion for a new trial.

The complaint states a cause of action, and it does

1. not appear from the pleading that there was another action pending between the same parties for the same cause, and the demurrer was properly overruled.

Counsel for appellant insist that the court pass upon the sufficiency of the verified plea in abatement, but this

2. question is not presented. It could only be presented by demurrer and exception properly taken, and this was not done.

Sixteen grounds are set out in appellant's motion for a new trial, which, so far as they are argued, will be considered. The third cause stated is that the verdict of

3. the jury is not sustained by sufficient evidence, and the fourth is that the verdict of the jury is contrary to law. This we shall consider together.

The evidence fairly tends to prove that claimant remained at her father's house more than twelve years after she became of age, nursed her mother for three years, looked after and took care of her father, and performed the major portion of the housework during the time she remained at home; that some years before her father's death he made a will, devising to her the house where they lived, in fee simple; and that she saw the will. Sarah E. Bogardus testified that decedent said to her that he had helped Fred (meaning his son), and that he was going to leave the rest to Kate (this claimant). Decedent stated to Emma Bogardus that Fred had had his share, and what he had was Kate's; that it was to be left to her; that he was going to leave the estate to her. Mary E. Long testified as follows: "I heard him tell Mrs. Eppert on her dying bed, that the property on Buchanan street would be devised to Kate, so that in case of death she would have an income as long as she lived; that he intended her to be well taken care of; that she had been a good faithful daughter, and he expected her to be well remembered and remunerated." Another witness testified as follows: "We were sitting on the porch one afternoon, and Kate came along. She was not feeling well, and sat down, and he said 'This is my baby,' and she started to cry, and he said, 'Never mind, Katy, I will pay you back some day,' I said: 'You have Fred,' and he said: 'No mat-

ter; Fred does not come to my house, but Kate has always taken care of me, and helped me to get what I have.' He said she had been a good girl to him, and that 'If I had not had Kate to save for me, I would have nothing'." Other witnesses testified to hearing him acknowledge the value of appellee's services rendered.

John Hugg, who prepared the two wills, testified that by the terms of the first will decedent devised one of the parcels of real estate to his daughter absolutely, and the other piece to his son. The evidence also reveals the fact that, in at least one instance, he spoke of the property as being Kate's in her presence and in the presence of another person; that shortly before his death he burned this will, and executed another.

The validity of appellee's claim depends upon the question whether she rendered services for her father in his lifetime in pursuance of an agreement, either expressed or implied, that she was to be paid for such services. If appellee lived in her father's home as a member of his family, and worked for him without any understanding, either express or implied, that she was to receive pay for services rendered, then she could not recover against the estate; but it is equally true that if the evidence shows facts and circumstances from which a contract might reasonably be inferred, then she can recover the value of her services rendered under such implied contract. *Hill v. Hill* (1889), 121 Ind. 255; *Kettry v. Thumma* (1894), 9 Ind. App. 498; *Puterbaugh v. Puterbaugh* (1893), 7 Ind. App. 280; *Smith v. Denman* (1874), 48 Ind. 65; *James v. Gillen* (1892), 3 Ind. App. 472; *Robinson v. Raynor* (1864), 28 N. Y. 494; *Stewart v. Small* (1894), 11 Ind. App. 100.

This case is not unlike the case of *Crampton v. Logan* (1902), 28 Ind. App. 405, where the court used this language: "And if the circumstances authorized the person rendering services reasonably to expect payment therefor,

by way of furtherance of the intention of the parties, or because reason and justice require compensation, the law will imply a contract therefor.”

There is some evidence tending to prove a contract between appellee and her father; at least enough to rebut the presumption that the services were rendered by her

5. gratuitously, and the rule is well settled that where it is the province of the jury to decide questions of fact, that decision will not be disturbed, if there is any evidence presented to sustain the verdict. *Wallace v. Long* (1886), 105 Ind. 522; *Story v. Story* (1891), 1 Ind. App. 284; *Knight v. Knight* (1893), 6 Ind. App. 268; *Forester v. Forester* (1894), 10 Ind. App. 680; *Steward v. Small, supra*.

It has also been correctly held that a promise on the part of a parent to compensate a child by a conveyance of land for nursing, care and attention, will rebut the pre-

6. sumption which arises because of the fact that the work was done while the child was living in her father's family, that the work was performed gratuitously. *Wallace v. Long, supra*.

Some evidence having been introduced by appellee

7. to support the allegations of her complaint, the court committed no error in overruling appellant's request for a peremptory instruction.

The evidence introduced at the trial is not in all respects satisfactory; however, it may be said that it tends to establish the averments of the complaint, and as it has

5. been passed upon by a jury, which found in favor of appellee, and the action of the jury has been approved by the trial court, this court is not authorized to disturb the verdict. After a careful examination of all the evidence, we conclude that there were facts and circumstances proved by the trial in the lower court that justified the jury in drawing the inference that there was an

understanding between decedent and appellant that she was to be paid for the work done by her, and that she expected pay therefor.

Appellant earnestly contends that certain instructions given by the court to the jury were erroneous, but after a full consideration of each of them we are of the

8. opinion that, when taken together, they clearly and fully state the law applicable to this case. The jury was given full, elaborate and specific instructions bearing upon the material evidence in this cause.

Appellant also earnestly insists that the trial court committed error in refusing to give instructions requested. We

have not been informed wherein such instructions
9. were relevant to the case, and we are unable to find wherein they would have been proper, in view of the issues. Neither do we find that appellant was in any manner harmed by the court's refusal to give the instructions asked, as the trial court was not, under the issues joined, required to construe the will and codicil of Francis M. Eppert, deceased. The will and codicil were introduced in evidence for what they were worth, and it is presumed they were considered by the jury, so that if the contents of the will and the codicil were competent as tending to show payment, the cross-complaint filed in a different and other cause of action, in which a construction of the will was asked, would add nothing, and the court committed no error in this respect.

It is insisted by counsel for appellant that the court erred in excluding evidence offered by appellant. The reason

given for insisting on this proposition is "that the
10. evidence tended to show that decedent entertained no thought that he was indebted to the appellee for the services rendered." It does not appear that any such statement, if made, was made in the presence of the claimant, and could not be considered anything more than a self-serving declaration uttered by decedent.

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The sixteenth cause assigned by appellant for a new trial is that the court erred in refusing to permit a witness to answer the following question: "What, if anything, 11. did you ever hear Francis M. Eppert say about holding an insanity inquest on his daughter, Nancy Gardner?" We fail to see how this matter was in any way material to a just conclusion of this case, as it related entirely to an immaterial matter, and there was, therefore, no error in refusing to permit the witness to testify concerning it.

We have examined all the questions raised by this appeal that have been argued, and conclude there is no error in the record. Judgment of the court below affirmed.

Felt, J., did not participate.

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BROWNELL IMPROVEMENT COMPANY ET AL. v. NIXON ET AL.

[No. 7,391. Filed October 14, 1910. Rehearing denied June 28, 1911.]

1. **LIENS.—Superiority.—Common Law.—Statute.**—At the common law the superiority of liens was fixed by the time of their attaching, but a different rule may be fixed by statute. p. 199.
2. **MUNICIPAL CORPORATIONS.—Street-Improvement Liens.—Priority.—Statutes.**—Under §3623f Burns 1901, Acts 1901 p. 534, §6, providing that street-improvement "assessments, as made, shall be a lien upon the several lots, tracts of land and parcels of ground to the same extent that taxes are a lien upon such property, and shall be collectible in the same way that taxes are collected," the liens of two or more street-improvement assessments are equal, though such improvements are made at different times. pp. 199, 200, 201, 210.
3. **STATUTES.—Words.—Construction.**—The words used in a statute should be given their ordinary meaning, unless it clearly appears that a different meaning was intended. p. 200.
4. **MUNICIPAL CORPORATIONS.—Taxation.—"Taxes."—"Assessments."—Statutes.**—The words "taxes" and "assessments" as

used in §3623f Burns 1901, Acts 1901 p. 534, §6, providing that "the assessments [for street improvements] * * * shall be a lien upon the several lots, * * * to the same extent that taxes are a lien upon such property," import, respectively, a charge levied upon the person or property for the support of the government, and a special imposition placed upon property to pay for a public improvement. p. 201.

5. MUNICIPAL CORPORATIONS.—*Street-Improvement Liens.—Enforcement.—Basis of Suit.—Collateral Attack.*—In a suit to foreclose street-improvement liens, the assessments made constitute the basis of the suit; and a defense that the contract for such improvement, and the assessments made, were void, constitutes a collateral attack on the judgment of the council in making them. p. 204.

6. MUNICIPAL CORPORATIONS.—*Street Improvements.—Assessments.—Jurisdiction.—Statutes.*—The right of a municipal corporation to assess property for the making of street improvements is statutory; and the statutory method of obtaining jurisdiction to make such assessments is mandatory and must be substantially complied with. p. 204.

7. MUNICIPAL CORPORATIONS.—*Street-Improvement Assessments.—Void.—Collateral Attack.*—Where a city council, having no jurisdiction thereof, makes assessments for street improvements, its action is void; and if such want of jurisdiction appears upon the face of its proceedings, the validity thereof may be questioned on a collateral attack. p. 205.

8. MUNICIPAL CORPORATIONS.—*Street-Improvement Assessments.—Jurisdiction.—Notice.*—Where a frontager's name, in a street-improvement proceeding, was omitted from the notice given by the city clerk of the meeting of the city commissioners, as required by §3623c Burns 1901, Acts 1901 p. 534, §3, but notice by publication was given as required by §3623d Burns 1901, Acts 1901 p. 534, §4, setting forth the location and terminal points of the improvement, the date of filing the commissioners' report, and the time of the meeting of the council to consider such assessments, inviting all persons interested to appear, the council had jurisdiction of the matter, and an assessment so confirmed by the council is valid. p. 205.

9. MUNICIPAL CORPORATIONS.—*Street-Improvement Assessments.—Jurisdiction of Council.*—The common councils of cities have exclusive original jurisdiction of the subject-matter of street-improvement assessments, and in the exercise thereof they act in an administrative capacity until notice is given, and property owners appear for the final adjustment of assessments, when their action is *quasi-judicial*. p. 206.

10. MUNICIPAL CORPORATIONS.—*Street Improvements.—Notice to Bidders.*—Under §3623a Burns 1901, Acts 1901 p. 534, §1, pro-

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viding that "when the common council of any city * * * desires to make any street * * * improvement, it shall * * * fix a date upon which bids will be received," and "shall give notice of the letting of such contract," the common council cannot, in the absence of notice to the bidders, let a contract for such improvement. p. 206.

11. MUNICIPAL CORPORATIONS.—*Street Improvements.—Jurisdiction.—Presumptions.*—Where a common council has jurisdiction to order the making of street improvements, such jurisdiction is presumed to continue, unless, upon the face of the council's proceedings, it appears to have been lost. p. 207.

12. MUNICIPAL CORPORATIONS.—*Street Improvements.—Plans.—Notice.—Special Findings.*—In a suit for the foreclosure of a street-improvement lien, special findings that the resolution of the council for the making of such improvement conformed to the statutory requirements (§3623a Burns 1901, Acts 1901 p. 534, §1), that the notice to bidders referred to plans and specifications on file with the city clerk, but failing to show that the plans and specifications referred to in the notice were a part of the resolution, and that the council changed the plans and specifications on file with the clerk after the bids were received, do not show a loss of jurisdiction, since the change of the plans on file with the clerk might have been made to conform to the resolution of the council. p. 207.

13. MUNICIPAL CORPORATIONS.—*Street Improvements.—Notice.—Estoppel.*—Where some notice of a street improvement is given and the council holds it sufficient, frontagers who know of the street improvement and who stand by without objection until the work is completed are estopped to question the validity of the notice or the jurisdiction of the council to order such improvement. p. 208.

14. MUNICIPAL CORPORATIONS.—*Street-Improvement Liens.—Equity.*—Suits to foreclose street-improvement liens are of equitable cognizance. pp. 208, 210.

15. MUNICIPAL CORPORATIONS.—*Street Improvements.—Notice.—Estoppel.—Special Findings.*—While it is true that a subsequent purchaser of a lot assessed for street improvements who knew of the making of such improvements would not be estopped to contest the validity of the notice of the improvements where the owner did not know of the making of such improvements, yet where the special findings show that the owner was present when the council awarded the contract for the improvements, and that three times a week he visited his daughter, who lived on the street where the improvements were being made, notice is sufficiently shown. p. 211.

From Fountain Circuit Court; I. E. Schoonover, Judge.

Brownell Improv. Co. v. Nixon—48 Ind. App. 195.

Suit by the Brownell Improvement Company and another against Mary F. Nixon and others. From a judgment for defendants, plaintiffs appeal. *Reversed.*

Clodfelter & Hester, for appellants.

Lucas Nebeker, Courtney W. Dice, A. T. Livengood and Fred S. Purnell, for appellees.

MYERS, J.—This was a suit by appellants to foreclose certain street-improvement liens, and is based on assessments made and confirmed by the common council of the city of Veedersburg. Said council in making said improvement and assessments proceeded under an act of the General Assembly, approved March 11, 1901 (Acts 1901 p. 534, §§3623a-3623h Burns 1901). Said improvement consisted of grading a certain designated portion of Mill street, in the city of Veedersburg. The contract for said improvement was let by said council on September 26, 1901, to J. H. Palmer, who completed the improvement about July 2, 1902. Thereafter bonds were issued, aggregating \$11,670, the total cost and contract price of said work, and delivered to said Palmer, who thereafter in writing assigned them to appellants; that thereafter, as shown by the answer of the appellees Edward Patton, Henry Martin, John A. Foster, and the Wabash Clay Company, said council, acting under said act of 1901, on August 15, 1904, contracted with the firm of Patton & Martin further to improve said portion of Mill street, by grading and surfacing the roadway with brick, and by constructing concrete sidewalks and curbs along said roadway; that said firm entered upon said contract, and completed the work according to the plans and specifications at the contract price of \$18,439.65; that said council accepted said work, and thereafter such proceedings were had that assessments were made against the property abutting said improvement, aggregating said contract price, and bonds were duly issued by said city as provided in said act, and were delivered to said firm in payment of the cost of said improvement.

Among the questions fairly presented by the record in this case is that of priority of liens on the same property, growing out of two improvements of the same street under the same law, one at a later date than the other.

At common law, priority of liens, as a rule, was fixed by the time the liens attached to the subject-matter; but as to statutory liens, a different rule as to priority may

1. be fixed by the statute creating them. We are now considering statutory liens. Both improvements were made under the same legislative enactment. Section six of the act of 1901, *supra* (§3623f Burns 1901), provides that “assessments, as made, together with the interest
2. thereon, shall be a lien upon the several lots, tracts of land and parcels of ground to the same extent that taxes are a lien upon such property, and shall be collectible in ten equal annual instalments in the same way that taxes are collected.” The assessments in question were declared by statute to be a lien on the property assessed, “to the same extent as taxes are a lien.” By this statute the legislature fixed the extent and rank of the lien, and provided that such assessments should be collected by the same process and agencies used in collecting taxes, and “that delinquent instalments shall be collected in the same manner that delinquent taxes are collected,” or they may be collected in a foreclosure proceeding in any court of competent jurisdiction as a mortgage is foreclosed.

Said appellees insist that the liens occasioned by the last improvement are superior to those of the first improvement, and cite, in support of their contention, the case of *Burke v. Lukens* (1895), 12 Ind. App. 648, where it is held that the last shall be first and the first shall be last in the order of priority. The statute authorizing the assessments in that case (Acts 1889 p. 237, §3, §4290 Burns 1901) provided that assessments for street improvements, and the interest accruing thereon, “shall be a lien upon the property so assessed and shall remain a lien until fully paid,

and shall have precedence over all other liens, excepting taxes.”

The act under which the improvements in this case were made, expressly repeals all laws and parts of laws in conflict therewith, and especially the act of 1889, *supra*, so far as the provisions therein applied to cities not operating under special charters. The city of Veedersburg was not operating under a special charter; so that in this case we are to deal with the clause “to the same extent as taxes are a lien,” instead of the clause “and shall have precedence over all other liens, excepting taxes,” which was before this court in the case of *Burke v. Lukens, supra*. In that case it is said that “a strict construction of the wording of the statute fully warrants appellant’s assumption that the last lien of this kind acquired must have precedence over all other liens of a like character. The theory of the law is that every improvement of this character to the extent of the improvement enhances the value of the property.”

The wording of the statute is not ambiguous nor uncertain. Its language is not open to construction, and, under all rules for the interpretation of statutes, the words

3. used are to be given their usual and ordinary meaning, unless it clearly appears that some other meaning was intended. *Townsend v. Meneley* (1906), 37 Ind. App. 127; *Starr v. Board, etc.* (1907), 40 Ind. App. 7; *Truelove v. City of Washington* (1907), 169 Ind. 291; *State v. Shelton* (1906), 38 Ind. App. 80.

To say that the clause, “to the same extent as taxes are a lien,” clearly indicates a legislative intention to give later street-improvement assessment liens priority over

2. earlier like assessment liens not extinguished by a sale of the property, would require us to read into the statute words that seem to us were advisedly omitted by the General Assembly.

This court in the case of *Burke v. Lukens, supra*, on the theory that every improvement of streets, to the extent of

the assessments therefor, enhances the value of the property assessed, read into the statute the words "of a like character." Upon a careful reëxamination of that statute, we conclude that the reason given for the added words will not justify such a material addition.

The word "taxes" is well understood as a charge levied upon the person or property for the purpose of raising a general revenue for the support of the government,

4. and is a charge to which an individual claim on property must be deferred; while the word "assessments," as used in the statute under consideration, is generally understood as a local or special imposition placed upon property to pay for a public improvement, on the theory that such property thereby derives a special benefit. *Palmer v. Stumph* (1868), 29 Ind. 329.

The statute in question refers to street-improvement liens as a class, and, in effect, provides that such liens shall rank in extent or degree second only to that for taxes. It

2. is silent on the question of priority as between holders of such liens. It is general, making such assessments due in equal annual instalments, and collectible by the same procedure and through the same agencies as taxes are collected. Such assessments are placed on the tax duplicate and charged against the several lots, tracts of land and parcels of ground, and in case of nonpayment when due are subject to the same penalties as delinquent taxes, and are collected in the same manner that delinquent taxes are collected. No one would claim that in the sale of property to satisfy delinquent taxes, the taxes for any one year have precedence over the taxes for any subsequent or former year. Had the city paid for both improvements and had it been necessary for the city to sell the property assessed in order to recover the money paid, there would be no question of priority.

While this is a case between individuals holding statutory liens of equal degree, yet, in the application of the rule as

to priority of liens, we can see no reason for adopting a rule different from that which would apply in case the city had paid for the improvement, and was seeking to enforce the liens in its favor. It is only fair to say that the property benefited is charged with the aggregate of all such assessments, and the law looks to their payment, not because any particular person is entitled to it, nor because of any particular assessment for any particular improvement. The reason for the rule denying priority in such cases is, that the property was assessed upon the theory of benefits, and that every improvement of this character enhances the value of the property to the extent of such assessment. From this conclusion, it follows that the property mentioned in this case was increased in value to the extent of the assessment for both improvements, and the security for the payment of liens growing out of one was augmented by the other. The conclusion reached is not unfair to the party making the last improvement, as he was charged with notice of the first improvement liens outstanding (*City of Elkhart v. Wickwire* [1889], 121 Ind. 331), and ought not to be placed in a better position than he would have been had the first improvement not been made.

The question on the action of the court in overruling the demurrers to the answer of Jerome B. Dunkle and others, and the separate answer of Mary F. Nixon, is presented by the special findings of fact with the conclusions of law thereon, and exceptions reserved by appellants.

The conclusions of law were to the effect that the assessments upon certain described properties belonging to appellees Jerome B. Dunkle and Mary F. Nixon were void, and were not liens upon the respective parcels of land assessed, and that appellants were not entitled to a foreclosure or other relief against said properties.

The findings show that the city of Veedersburg, under an act approved March 11, 1901 (Acts 1901 p. 534, §§3623a-3623h Burns 1901), by its common council, on August 20,

1901, passed a declaratory resolution, and took such other steps as were required under said act, for the improvement of Mill street, by grading it between certain designated points thereon. Proceedings were had and notice to bidders was given fixing September 23, 1901, as the time, and the office of the clerk as the place, for receiving bids for the making of said improvement. At the time and place fixed for receiving bids, the council met, and four bidders submitted bids for doing the work set forth in the plans and specifications then on file with the city clerk. The council opened and read all bids, and took them under advisement until September 26, 1901, to which date said meeting of September 23 was adjourned; that before said adjournment said council went into secret session, and decided to, and did, modify and change said plans and specifications, by excluding the work of excavating for sidewalks; that J. H. Palmer bid \$12,995, which was the lowest bid received for doing the work required under the plans and specifications before they were modified; that on September 26, pursuant to adjournment, the council met, and without further advertisement or notice of the letting of said work, received and accepted a bid of \$11,670 from said Palmer for the work required by the plans and specifications so revised and changed, and on this bid he was awarded the contract; that at said adjourned meeting, and while the council had said bids under consideration, Samuel Cade, Margaret Dunkle, Mary F. Nixon, and other property owners affected by said improvement, were present, and filed written objections to the acceptance of any of said bids, for the reason that they were too high, and that said street should be improved as a unit. No other objections were made by said remonstrators. The contract entered into between said city and said Palmer was in all other respects in due form of law, and Palmer made said improvements, and fully complied with all the terms of said contract. Thereafter such proceedings were had by said council, in-

cluding an opportunity for a hearing by all persons interested regarding the assessment of their property for the payment of the improvement so made, and on September 5, 1902, said council made, adopted and confirmed the assessments in suit against the several lots, tracts and parcels of land benefited by said improvement; that among the several lots, tracts and parcels of land benefited by said improvement were certain tracts or parcels of land belonging to Samuel Cade, Margaret Dunkle and Mary F. Nixon; that appellee Nixon later became the owner of said parcels of land owned by Samuel Cade, and Jerome B. Dunkle thereafter became the owner of the lots so assessed while owned by Margaret Dunkle.

Appellees Nixon and Dunkle first insist that the Palmer contract for the improvement of Mill street was void, and that the assessments on their property to pay the cost of such improvement were also void, for the reason that after the plans and specifications were changed no notice was given inviting proposals for doing the work, and that the council did not acquire jurisdiction over the subject-matter and of the person.

The assessments were the basis of this suit (*Lewis v. 5. Albertson* [1899], 23 Ind. App. 147), and the defense is a collateral attack on the judgment of the council making them (*Zorn v. Warren-Scharf, etc., Pav. Co.* [1908], 42 Ind. App. 213).

Municipalities are by statute authorized to burden private property with the cost of street improvements, but their authority so to do depends upon a compliance with

6. the statute through which they derive such power.

The application of this power necessarily affects individual rights, and in such cases the manner of obtaining jurisdiction being by statute prescribed, and intended for the protection of the property owner, is mandatory, and must be substantially pursued. *Brown v. Central Bermudez Co.* (1904), 162 Ind. 452; *Garrigus v. Board, etc.* (1872),

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39 Ind. 66; *McCormack v. Terre Haute, etc., R. Co.* (1857), 9 Ind. 283; *City of Madison v. Smith* (1882), 83 Ind. 502.

The question being one challenging the power of the common council to make the assessments, we look to the proceedings had by that body to determine whether each

7. step essentially jurisdictional was taken. For if the council has failed to comply with some mandatory provision of the statute amounting to a condition precedent to its power to make the assessment in question, and it so appears upon the face of its proceedings, this question may be raised by a collateral attack. *Edwards v. Cooper* (1907), 168 Ind. 54; *Hibben v. Smith* (1902), 158 Ind. 206; *Brown v. Central Bermudez Co., supra*; *Zorn v. Warren-Scharf, etc., Pav. Co., supra.*

It is claimed, and the findings show, that the name of Cade did not appear in the notice given by the city clerk of the meeting of the city commissioners, as a person

8. whose property had been reported as benefited or damaged by said improvement, as provided in §3 of the act of 1901, *supra* (§3623c Burns 1901), and for this reason it is argued that the council failed to obtain jurisdiction over the person of Cade. We cannot agree with this contention, for the reason that the purpose of a notice is to give all persons affected an opportunity for a day in court, before final action on the assessments. The findings show that notice by publication was given, as provided in §4 of the act of 1901, *supra* (§3623d Burns 1901), setting forth the location and terminal points of such improvement, the date of filing the commissioner's report, and reciting the time and place at which council would meet for the purpose of confirming or modifying the assessments made by the commissioners, and inviting all persons interested to appear. The assessment roll, as reported to the council, contained the name of Cade and a description of his property which was proposed to be assessed. The report of the commissioners being advisory, only, the whole question of

benefits and the assessments was open for consideration by the council. It cannot be said that there was no notice, nor that there was no attempt to follow the statute. This being true, under the decided cases in this State we are compelled to hold that the omission of the name of Cade in the particular notice mentioned can amount to no more than an irregularity, and that the last notice was sufficient to give the council jurisdiction of the person of each landowner. *Brown v. Central Bermudez Co.*, *supra*; *Voris v. Pittsburg Plate Glass Co.* (1904), 163 Ind. 599; *Barber Asphalt Pav. Co. v. Edgerton* (1890), 125 Ind. 455; *Garvin v. Daussman* (1888), 114 Ind. 429; *Leeds v. Defrees* (1901), 157 Ind. 392; *Pittsburgh, etc., R. Co. v. Taber* (1907), 168 Ind. 419; *Hughes v. Parker* (1897), 148 Ind. 692.

Having determined that the council had jurisdiction of the person, we now inquire as to whether it had jurisdiction over the subject-matter. It must be kept in

9. mind that the common council of the city of Veedersburg had exclusive original jurisdiction respecting street improvements, and in the exercise of that authority acted in a business or administrative character until notice was given and the property owners brought in for the final adjustment of the assessments reported by the city commissioners, then it exercised what has been termed a *quasi-judicial* power. *Shank v. Smith* (1901), 157 Ind. 401, 55 L. R. A. 564.

The asserted jurisdictional defect is the absence of notice inviting proposals for the work. The findings show that the common council gave notice to bidders, and fixed

10. September 23 as the time, and the office of the city clerk as the place, for receiving bids. At the time and place aforesaid the common council met, and four bidders, and no more, submitted bids upon plans and specifications then on file with the city clerk. The facts show that a notice was given, as required by law, but it is found that the plans and specifications were changed after the

bids were received, and that no notice was given for bids for the work designated in the plans and specifications as changed, and for that reason the whole proceedings were declared void.

Section one of the act of 1901, *supra* (§3623a Burns 1901), under which the improvement was made, provides that “when the common council of any city, not operating under a special charter, desires to make any street, alley or sewer improvement, it shall order the same by the adoption of a resolution declaring such improvement to be necessary and stating the kind, size, location and terminal points thereof and fixing a date upon which bids will be received for the construction of said improvement.” It is true, as claimed by counsel, that the notice to bidders required by this section is a provision for the benefit of the property owners, and a condition precedent to the right of the common council to let the contract. *Ross v. Stackhouse* (1888), 114 Ind. 200; *Zorn v. Warren-Scharf, etc., Pav. Co., supra*. As said in the case of *Ross v. Stackhouse, supra*: “Where it affirmatively appears that the jurisdictional steps have been taken, upon which the power of the common council to contract depends, a contractor may rely upon the record, even though the jurisdictional facts may appear imperfect and irregular. After he has entered upon the work and expended money and labor for the benefit of the property owner, the latter will not be permitted to impair or break down the jurisdiction upon which the contractor may have relied, by bringing forward merely incidental matters, or by proof of extraneous facts, unless fraud or collusion be shown.”

At this point it may be well to state that no fraud or bad faith on the part of any one respecting any of the proceedings is found or claimed. The admitted notice was

11. clearly sufficient, in that respect, to give the council jurisdiction, and once acquired it will be presumed to continue, unless, upon the face of proceedings of that

body, it appears to have been lost. It will be observed that the statute under which this improvement was made 12. does not require plans and specifications, other than as stated in the declaratory resolution. The resolution in this case conformed to the statute, by stating the kind, size, location and terminal points of the proposed improvement. The notice to bidders referred to plans and specifications on file with the city clerk for a description of the work to be let. It is not found, as a fact, that the plans and specifications referred to in the notice were a part of the declaratory resolution, and we are not at liberty to aid a special finding by any inference or intendment. *Hill v. Swihart* (1897), 148 Ind. 319; *Green v. McGrew* (1905), 35 Ind. App. 104, 111 Am. St. 149. The work to be let and the basis for bidding were designated in the declaratory resolution. Plans and specifications on file with the city clerk, not in accord with the kind, size, location and terminal points of the improvement declared to be necessary, are not controlling, and do not furnish a proper basis for bidding. The resolution was adopted, and a certain designated improvement declared to be necessary by a vote of at least two-thirds of the members of the common council. The findings show that the common council, while in secret session, changed the plans and specifications, but there is no finding that the improvement described in the original resolution was in any manner changed. If the bidders were deceived by the notice, and bid on work not contemplated by the declaratory resolution, this fact alone would not necessarily render the proceedings of the common council void for want of jurisdiction.

In addition to the foregoing statement of facts, the findings show that from the time Palmer began said work, and from day to day until it was completed, he employed 13. about the work from eight to ten teams and a large number of men, and expended a large sum of money and much time in making said improvement; that during

all the time said work was being done, appellees Nixon and Dunkle knew that said contractor was making said improvement, and was expending large sums of money in doing said work, and at no time did they object to the contractor's doing his work. In view of these facts, another principle of law, announced by the court in the case of *Ross v. Stackhouse, supra*, is especially applicable. In that case it is said: "Regardless of the statute, however, it must be considered as settled by the decisions, and upon established principles, that where it appears, in a proceeding of this character, that an attempt was made to give notice, and that some notice was given, which the body charged with the duty of acting adjudged to be sufficient, a party whose property is to be benefited by the improvement cannot quietly stand by and receive the benefit and then question the regularity of the proceedings."

The parties who now challenge the validity of the Palmer contract were before the council at the time the bids were considered and the contract was let. One of the objections urged by them against the letting of the contract was that the bids were too high. Palmer reduced his bid, and it does not appear that any objection was offered by either of the parties to this last bid. There was no claim as to the invalidity of the proceedings or that the bid was too high, or that the improvement contracted for was different from that called for by the original resolution. We cannot say from the findings that the proceedings of the common council, upon their face, show an entire omission of any statutory step essentially jurisdictional, or that the jurisdiction acquired by that body was thereafter lost.

Other questions are presented, but we shall not consider them, as the judgment, for the reasons stated, must be reversed. We believe that justice will be best subserved by granting a new trial. It is therefore ordered that the judgment be reversed, and that appellant be granted a new trial.

Rabb, J., did not participate.

ON PETITION FOR REHEARING.

MYERS, J.—On petition for a rehearing, appellees seem to think that our opinion on the question of priority of liens should state whether it is based on the facts

2. averred in the answer of Patton and others, second improvement lienholders, or upon the facts as found by the court. At our former consideration of this case we took the facts in the answer as admitted. The complaint contained the usual allegations of fact in such cases. It alleged that these defendants held liens against said real estate inferior to the liens of plaintiffs, and called upon the defendants to answer as to any interest or liens claimed by them against the real estate described in the complaint. The answer brought before the court all of the proceedings of the second improvement, beginning with the declaratory resolution passed by the common council, and each step thereafter, including the issue of the bonds to the contractors, and their subsequent assignment to these defendants, whereby they claimed to hold liens superior to the liens of the first improvement. Conceding that appellants, by their action in withdrawing their reply to the answer, admitted all the facts averred in said answer, such action would not authorize the court to measure such facts by any other rule of law than that applicable to facts pleaded as a defense to plaintiff's claim of superiority. Facts confessed can have no more force than facts established in any other manner. If they failed to show superiority, and instead showed liens of equal rank with those sought to be enforced, then the court should have made such order in the premises as the facts under the law authorized. The case was one of equitable cognizance, 14. and as such the court was not without authority to make such order in the premises as justice and right between the parties seemed to warrant.

Again it is insisted that a part of the property now owned

by Nixon was, at the time the improvement was made, owned by Samuel Cade, and although Mrs. Nixon 15. may have known that the improvement was being made, her knowledge would have no binding force on the then owner of the property. This is all true, and while it must be admitted that the court did not find in so many words that Cade knew the work was being done, yet it was found that he was present at the time the common council awarded the contract to Palmer, that Mrs. Nixon, his daughter, resided on a lot belonging to Cade, which abutted on the improved portion of the street, at the time the improvement was being made, and that, while a large number of men and teams were at work making said improvement, he visited his daughter from one to three times a week. From such facts but one conclusion must follow, and that is, that Cade knew the improvement was being made. It is found as a fact that he at no time notified the contractor that he objected to the making of the improvement, or that he would contest any assessment made against him on account thereof, or that the contract was illegal; nor does it appear that he at any time challenged the validity of the proceedings in the common council. At our former consideration of this case, we concluded that the common council had jurisdiction of the person of Cade at the time the assessments sued on were made.

Counsel, in support of their petition for a rehearing, have discussed other questions, which were considered and decided at the former hearing of this case, and with the decision of those questions we are still satisfied.

The petition for a rehearing is overruled.

LUCAS v. RHODES.

[No. 6,934. Filed April 27, 1911. Rehearing denied June 28, 1911.]

1. EASEMENTS.—*Rights of Way.—Creation of.—Presumptions.—*

A way is an incorporeal hereditament and consists in a right to pass over the land of another; and it may arise from grant, pre-

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scription or necessity, and is either in gross—attached to, and dying with, the person using it—or appurtenant—annexed to and passing with a conveyance of the land—the disputable presumption being that it is appurtenant. p. 217.

2. EASEMENTS.—*Rights of Way.—Appurtenant.—Evidence.*—Evidence that the former owner of plaintiff's land had access over his own land to a highway on the east side thereof, that he owned another farm lying southwest from the plaintiff's farm, and separated therefrom by another farm over which he passed to reach the latter farm, and that such route was much nearer than any other, justifies a finding that any easement acquired therein by prescription was appurtenant and not in gross. p. 218.
3. EASEMENTS.—*Prescription.—Elements.*—To create an easement by prescription in a right of way the use of the way must be adverse, under a claim of right, exclusive, continuous, uninterrupted and with the owner's knowledge and acquiescence. p. 219.
4. EASEMENTS.—*Rights of Way.—Permissive Use.—Presumptions.*—The fact that an owner himself used a way left open across his farm, that an adjoining proprietor also used it, by virtue of an agreement that he should assist in keeping it in repair and in maintaining gates along the way, raises a disputable presumption that the adjoining proprietor's use was permissive. p. 219.
5. EASEMENTS.—*Prescription.—Question for Jury.*—Whether a right of way was obtained by prescription is ordinarily a question of fact for the jury. p. 220.
6. APPEAL.—*Weighing Evidence.*—The Appellate Court will not weigh conflicting evidence. p. 220.
7. TRIAL.—*Instructions.—How Considered.*—Where the instructions as a whole fairly state the law to the jury no prejudice is shown. p. 221.
8. TRIAL.—*Instructions.—Incorrect.*—Incorrect instructions should be refused. p. 221.
9. TRIAL.—*Instructions.—Duplication.*—Instructions requested that are covered by those given should be refused. p. 221.
10. TRIAL.—*Verdict.—Interrogatories.*—Answers to the interrogatories to the jury control the general verdict only where they are irreconcilable therewith under any evidence supposable within the issues. p. 221.
11. EASEMENTS.—*Prescription.—Descent.*—Easements appurtenant in a right of way pass with the land to the owner's heirs. p. 222.
12. EASEMENTS.—*Descent.—Partition.—Deeds.*—Easements appurtenant pass by descent with the land; and where quitclaim deeds are made by the heirs in partitioning such land, the heirs hold title by descent and not by virtue of such deeds. p. 223.
13. EASEMENTS.—*Omissions.—Partition.—Deeds.*—Where two heirs make quit-claim deeds dividing their father's land, the fact that they mentioned certain easements therein, but failed to mention

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an alleged easement over a neighbor's land, does not import the exclusion of the latter easement; but such easement passed as appurtenant to the inherited land. p. 224.

From Fountain Circuit Court; *I. E. Schoonover*, Judge.

Suit by Mary A. Rhodes against John H. Lucas. From a decree for plaintiff, defendant appeals. *Affirmed.*

O. B. Ratcliff, for appellant.

V. E. Livengood and *Fry Bryant*, for appellee.

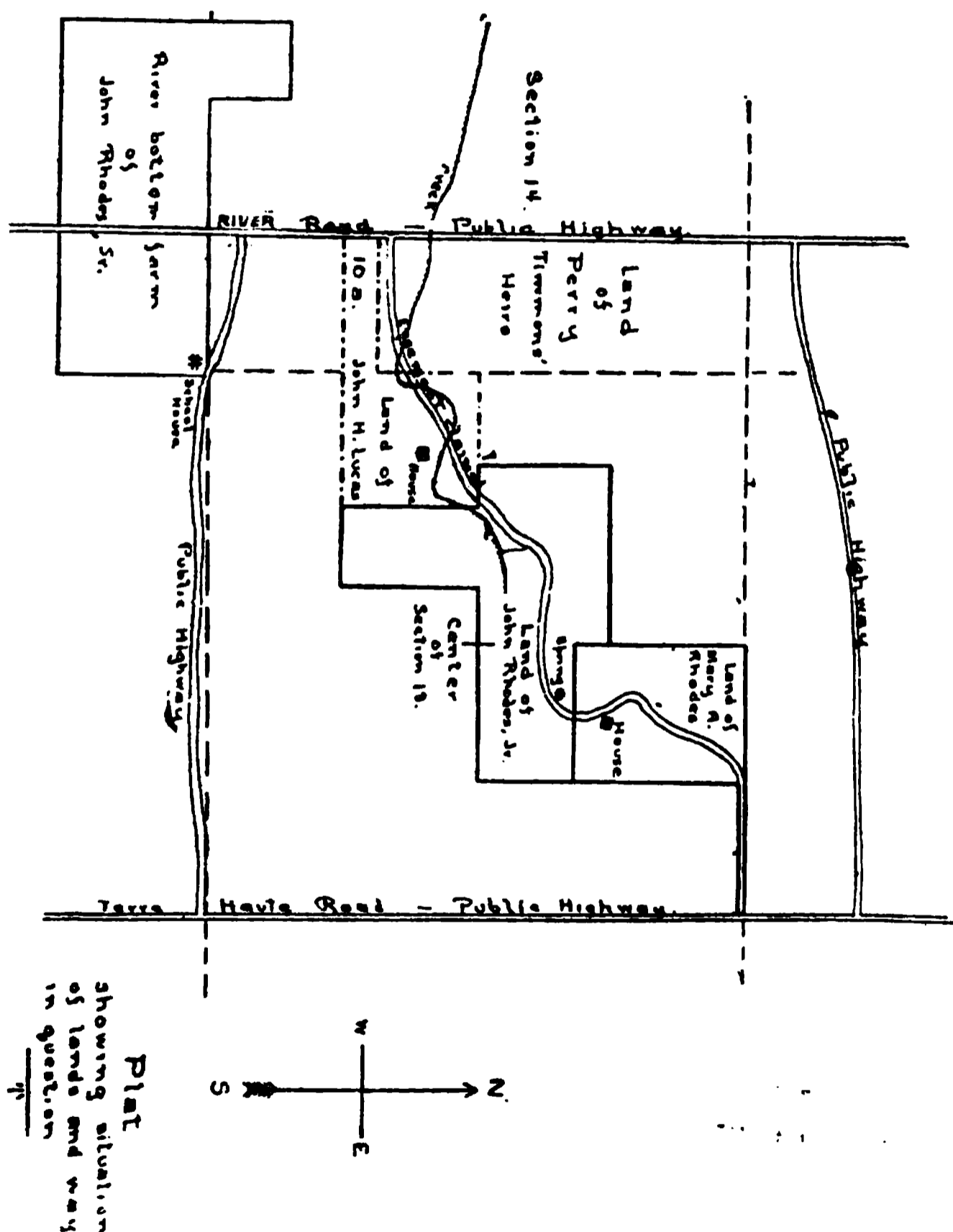
HOTTEL, J.—This suit was brought by appellee against appellant to quiet title in her to a right of way through appellant's land. The complaint is in one paragraph. The cause was put at issue by a general denial, there was a trial by jury, a general verdict for appellee, answers to interrogatories filed therewith, and a judgment on the verdict in favor of appellee, from which appellant took this appeal.

The errors assigned and relied on by appellant for reversal call in question the ruling of the court on the motion for a new trial, and the motion for judgment in appellant's favor upon the answers to interrogatories.

The facts in this case about which there is no dispute are, in substance, as follows: For fifty years or more appellee's father, John Rhodes, Sr., deceased, and Perry Timmons owned adjoining tracts of land in Fountain county, Indiana, located between two roads, running parallel north and south, and about one and one-fourth miles apart, the road on the east being known as the "Terre Haute road" and the road on the west, the "river road." The Rhodes tract was the closer to the Terre Haute road, and, in fact, contained and embraced a strip of ground of one acre, used for road purposes, which extended out to said Terre Haute road, thereby giving to said Rhodes a direct outlet and passageway over his own land to said Terre Haute road. It appears also from the evidence that the way as used by said Rhodes to get from his premises to said Terre Haute road was a continuation of the way in question. Said Timmons tract adjoined said Rhodes tract on the west and

south, and extended west to said river road. On the southeast forty of said Timmons tract, being the forty that appellant now owns and over which the easement in question passes, there was a residence near said easement, which the tenants and renters of said Timmons occupied and used. Perry Timmons continued the owner of said forty-acre tract until 1892, when he sold it to his son, John, and said John held and owned it until August, 1896, when he sold it to appellant. Said Timmons and son and appellant, and their tenants and employes, each and all during said ownership and occupancy of said tract used said right of way now claimed by appellee, that being the only way they had to get to the river road, until the appellant bought another tract of land, built on it, and abandoned and tore down said residence. Said John Rhodes, deceased, during his life also owned a river-bottom farm, which was southwest of and separated from his upland farm, and lay part on each side of said river road. In March, 1904, John Rhodes, Sr., died intestate, and in April, 1904, his children and heirs agreed upon a partition and division of his real estate, and made quitclaim deeds to one another for their respective shares therein. In this division appellee got the northeast fifty acres with the old home on it, and the one-acre strip leading out to the Terre Haute road, and her brother John got a 105.33-acre tract lying between and entirely separating the lands of appellee and appellant, and being one of the tracts over which said right of way passes. In making their quitclaim deeds to one another for their said respective shares of said real estate, said John Rhodes, in his deed, provided for a right of way over appellee's tract to the Terre Haute road, and appellee's deed recognized this right of way and was made subject thereto, and appellee in her deed provided for the right to use a spring on the tract conveyed to her brother John, and John's deed was also made subject to such use, but no provision or mention of the right of way in question was made in either of said deeds. The right of way in question

had been used by appellee and her predecessor in title, John Rhodes, Sr., deceased, prior to the bringing of her suit herein, for a period of about sixty years, for purposes of travel in any and all kinds of vehicles used by them in going to and from said residence on said upland farm to said river road, and especially by decedent Rhodes in going to and from his said residence and upland farm to his said river-bottom farm. We append a plat of the several tracts of land over which



the way passes, showing the location of the road with reference thereto.

In his argument, appellant first discusses the sufficiency

of the evidence to sustain the verdict, and insists that appellee, in her complaint, proceeds upon the theory that she has a prescriptive right to the way in question appurtenant to the land, and that she must recover on this theory, or not at all.

Appellee, on the other hand, insists that the general allegations of the complaint “are comprehensive enough to include the right of way derived by any of the well-recognized means—by grant, prescription or necessity”—and cites as supporting this position the cases of *Mitchell v. Bain* (1895), 142 Ind. 604, *Steel v. Grigsby* (1881), 79 Ind. 184, 186, and others. These cases lend support to appellee’s position, and this theory seems to have been adopted by the court below and the parties in the trial of the cause, judging by the evidence, the answers to the interrogatories, and the judgment rendered in the case, as disclosed by the record; but under our view of the evidence in this case, as hereinafter expressed, it is not important whether the complaint be given the comprehensive scope claimed by appellee, or restricted and limited, as insisted upon by appellant. Our ultimate conclusion is the same in either event.

The first ground of the motion for a new trial is predicated on the insufficiency of the evidence to sustain the verdict. As reasons for urging this ground of the motion, counsel insist (1) that the evidence shows that appellee and her predecessors in title have at all times had over their own land a good way out to said Terre Haute road; that the right of way in question has at no time been essential to the use and enjoyment of appellee’s tract of land, and that therefore no easement appurtenant to said real estate could be created by prescription, but that whatever easement, if any, was created by such use was in gross, and died with the person so using the way for the required length of time; (2) that the evidence shows that the right of way in question up to the time of the removal of the residence on appel-

lant's forty-acre tract, was and always had been necessary to the use and enjoyment of appellant's said tract, and that in such a case the use of said way by appellee and her predecessors in title "did not necessarily import adverse user under a claim of right, but, under such circumstances, such use may be inferred to be with the consent and permission of the owner of the servient estate;" (3) that the undisputed evidence shows that the use of the way in question "began about sixty years ago, in the intimate relations of two adjoining landowners over and across their adjoining farms, * * * for mutual accommodation, and that such use was inconsistent with the adverse use under a claim of right necessary under the law to create title by prescription;" (4) that the undisputed evidence shows that in the beginning of the use of the way in question there was an agreement between John Rhodes, Sr., deceased, and appellant's remote grantor, Perry Timmons, "whereby said Rhodes was to keep up a part of the gates and the road for the privilege of going along said way in question," and that the use of said way began and continued "in not only a spirit of mutual accommodation, but also a spirit of mutual remuneration," and that such use under said agreement was permissive only, and never intended by either of the parties to said agreement to be "perpetual," and to constitute an "unqualified right."

The law applicable to and controlling upon the first ground, urged by appellant against the sufficiency of the evidence, as laid down by the Supreme Court, is as

1. follows: "A way is an incorporeal hereditament, and consists in the right of passing over another's ground. It may arise from grant, prescription or necessity, and is either in gross, that is, attached to the person using it, or appurtenant, or annexed to and passing with a conveyance of the estate, *but it is never presumed to be in gross when it can be fairly construed to be appurtenant to the*

land.” (Our italics.) *Sanzay v. Hunger* (1873), 42 Ind. 44, 48. See, also, Washburn, Easements (4th ed.) p. 257; 2 Blackstone’s Comm. *35, notes by Cooley.

“Private ways are either appendant or in gross. Ways appendant are incident to an estate; they inhere in the land, concern the premises, pertain to its enjoyment and pass with the land. Ways in gross attach to and vest the right in the person to whom granted. *Alley v. Carleton* [1867], 29 Tex. 74, 94 Am. Dec. 260; *Davidson v. Nicholson* [1877], 59 Ind. 411; *Moore v. Crose* [1873], 43 Ind. 30; *Sanzay v. Hunger* [1873], 42 Ind. 44; *Fankboner v. Corder* (1891), 127 Ind. 164; *Harding v. Cowgar* (1891), 127 Ind. 245. Ways in gross cannot be assigned or granted to another.” *Hoosier Stone Co. v. Malott* (1891), 130 Ind. 21.

What appellant says, with reference to the disclosure by the evidence that appellee and her predecessor in title had a way over their own land to the Terre Haute road, is

2. true. This fact might preclude the existence of the way in question by necessity, but we do not understand that such fact necessarily prevents the way in question from being appurtenant to appellee’s land. There is evidence that shows also that the private way in question was the only direct road from the residence and upland farm of John Rhodes, Sr., to the river road and his bottom farm; that the distance to such river road and bottom farm from said upland farm, and the residence thereon, by such direct way was about two miles shorter, and less than half the distance by said Terre Haute road; that the way in question connected said upland farm with said river road, having one of its termini on said upland farm and the other at said river road, and also connected by direct route said river farm with said upland farm. This evidence tended to show that the way in question was incident to appellee’s land, and pertained to its enjoyment within the meaning of the authorities, heretofore cited, and therefore warranted the jury

in finding that any easement acquired therein by prescription was appurtenant to the land, and not in gross.

Reasons two, three and four, urged by appellant against the sufficiency of the evidence, in effect challenge its sufficiency to show an adverse user of the way in question

3. under a claim of right. The rule of law upon the subject of what constitutes an easement by prescription is that to create an easement by prescription the use thereof must be adverse under a claim of right, exclusive, continuous and uninterrupted, besides being with the knowledge and acquiescence of the owner of the estate over which the easement is claimed. *Davis v. Cleveland, etc., R. Co.* (1894), 140 Ind. 468, 470; *Nowlin v. Whipple* (1889), 120 Ind. 596, 598, 6 L. R. A. 159; *Rennert v. Shirk* (1904), 163 Ind. 542; *Fankboner v. Corder, supra*.

It is true, as appellant insists, that the undisputed facts show that the way in question during all its use by John Rhodes, Sr., appellee's predecessor in title, up to the

4. year 1899, was also used by appellant and his predecessors in title, and that such way was kept open by appellant and his predecessors, for their own benefit, and we think that counsel are correct in their statement that in such case, under the law, the use of such way by John Rhodes, Sr., was not necessarily adverse, but was entirely consistent with the use of appellant and his predecessors, and that the natural inference would be that such use by said Rhodes was permissive only. We submit, however, that such inference may be overcome by other evidence in the case.

It is also true that there was considerable evidence tending to show that the use of the way in question by John Rhodes, Sr., grew out of the friendly relations existing between him and his neighbors, appellant's predecessors in title, and that there was in the beginning of the use some agreement between said Rhodes, and said Timmons, both

deceased, by which said Rhodes was permitted to use the way in question, upon condition that he would assist in keeping it in repair, and in maintaining gates along said way. This evidence also indicated, as counsel insist, a permissive use only of the way, and was inconsistent with the adverse use contemplated by the law, and no matter how long continued, under such executory agreement and license, could never ripen into an absolute right or title. But on the other hand, there was some evidence that tended to show an adverse use, a use under a claim of right, recognized and acquiesced in by appellant's predecessors in title. A number of witnesses testified that for a period of fifty years and more decedent Rhodes, his family and employes used said way whenever, and in any manner, they saw proper, without asking permission, and without objection from appellant's predecessors, and that said Rhodes, his sons and employes assisted in repairing said way. The widow of said Perry Timmons testified that she heard her husband say, while he was in possession of the land over which the easement passes, at the time he sold appellant's said forty-acre tract to his son John, that "there was always to be a road there." Another witness testified that he heard Perry Timmons say to John Rhodes, Sr., while Timmons was in possession of said land, on an occasion when said witness was at work for Rhodes, that he (Timmons) wanted the road "to stand open always. It is the best way through there."

It was for the jury to say whether, under all the evidence throwing light upon the manner and character of said use of the easement in question, and on all the facts and

5. circumstances connected therewith, it was adverse, or permissive only.

There was some evidence that tends to support

6. the finding. This was enough, under the law, to prevent this court from disturbing the verdict.

Counsel also insist that the court erred in giving certain

instructions in the case, tendered by appellee, and in refusing others tendered by appellant. We have examined these instructions, and, taken as a whole, we are of the opinion that they state the law correctly and without prejudice to appellant.

Instruction twenty-four, asked for by appellant, and refused, relies upon the quitclaim partition deeds made among the heirs of John Rhodes, Sr., to defeat appellee's right in the easement in question, and for the reasons hereinafter expressed in considering the motion for judgment on the interrogatories, we think is not a correct statement of the law.

The principles covered by instructions twenty-two and twenty-three, asked for by appellant, and refused by the court, we think are more accurately expressed in other instructions given.

Appellant also insists that the verdict was contrary to law, but as the same questions are presented on the motion for judgment on the answers to interrogatories, we have considered this question under that error assigned. No error was committed by the trial court in overruling the motion for a new trial.

Appellant next urges that his motion for judgment on the answers to the interrogatories should have been sustained.

This motion was properly overruled, unless such special findings and the general verdict cannot be reconciled with each other under any supposable facts provable under the issues. *Rogers v. Leyden* (1891), 127 Ind. 50; *Ohio, etc., R. Co. v. Heaton* (1894), 137 Ind. 1; *Rouyer v. Miller* (1896), 16 Ind. App. 519.

Appellant insists, however, that the answers to these interrogatories exclude every conclusion that will authorize a recovery, and, as ground for so insisting, says that the answers to the interrogatories find that appellee had a good way over her own lands to the Terre Haute public highway, and that therefore the way in question is not one of neces-

sity; that appellee was a party to the partition quitclaim deeds, dividing the lands of her deceased father, whereby she became the owner in fee of fifty-one acres, and her brother John became the owner of 105.33 acres, which “lie between and entirely separate said land of appellee from that of appellant;” that both deeds provide for an easement to said brother over appellee’s land out to the Terre Haute road, and an easement to appellee in a spring on the land of said brother, but make no provision for or mention of the right of way in question over said brother’s said tract, and thus failing to provide for such right of way over said brother’s tract, she lost said right, and such tract separating that of appellant from appellee, the easement over appellant’s land, if ever appurtenant to appellee’s land, ceased to be so appurtenant from and after the separation of said tracts by the brother’s intervening tract over which the easement was not preserved.

Our conclusion upon the other phase of the case obviates the necessity for discussing the effect of these answers upon

the question of whether this is a right of way by
11. necessity. Having reached the conclusion before indicated in discussing the evidence, viz., that there was some evidence that justified the jury in finding that a prescriptive right in and to the way in question had been acquired by John Rhodes, Sr., before his death, and that such right was not in gross, but was appurtenant to the land, it follows under the law that whatever right was acquired by John Rhodes, which was appurtenant to his land, passed with the land to his heirs. *Ross v. Thompson* (1881), 78 Ind. 90, 98; *Keiper v. Klein* (1875), 51 Ind. 316, 318; *Parish v. Kaspere* (1887), 109 Ind. 586, 588; *Ellis v. Bassett* (1891), 128 Ind. 118, 122, 25 Am. St. 421; *Fankboner v. Cordon*, *supra*.

Whatever right or title appellee holds in any portion of the land of her deceased father, separated and set off to her by her quitclaim deed, she holds by descent and not by

such deed, and this principle applies with equal force
12. to any and all easements appurtenant to the land
so set off to the respective heirs. *Avery v. Akins*
(1881), 74 Ind. 283, 290; *Moore v. Crose* (1873), 43 Ind. 30,
33; *Thompson v. Henry* (1889), 153 Ind. 56; *Haskett v.*
Maxey (1893), 134 Ind. 182, 189, 19 L. R. A. 379.

In the case of *Avery v. Akins*, *supra*, our Supreme Court,
at page 290, quotes with approval from a California case:
“In *Wade v. Deray* [1875], 50 Cal. 376, it was held to be
‘well settled that a decree or judgment in partition has no
other effect than to sever the unity of possession, and does
not vest in either of the cotenants any new or additional
title. After the partition, each had precisely the same
title which he had before; but that which before was a
joint possession was converted into a several one.’ See,
also, *Knight v. McDonald* [1871], 37 Ind. 463, and *Teter v.*
Clayton [1880], 71 Ind. 237.”

Moore v. Crose, *supra*, was a case where an easement
claimed to be appurtenant to the land was involved. There
was also a quitclaim deed afterward made to said easement.
In discussing that case the Supreme Court said: “The ap-
pellant claims that the way was appendant or appurtenant
to the land conveyed by that deed. If so, the right to the
way passed by the deed conveying the land, and not by the
separate quitclaim deed.”

The quitclaim deed made by the heirs of John Rhodes, Sr.,
separating and dividing the lands of their deceased father
among themselves, only operated to transfer such interest as
the respective grantors had inherited from their deceased
father to the respective grantees of the several deeds, and
created no new title in such grantees.

In the case of *Stephenson v. Boody* (1884), 139 Ind. 60,
68, the Supreme Court said: “The general proposition is
abundantly maintained by the adjudged cases that a deed
of release, or quitclaim, as was the case here with at least one
of the deeds, or a conveyance of the right, title and interest

of the grantor, even though it be with full covenants of warranty without designating in the instrument any particular estate, as was the case with at least two of the deeds here involved, operates simply to transfer whatever interest the grantor had at the time. *Habig v. Dodge* [1891], 127 Ind. 31; *Locke v. White* [1883], 89 Ind. 492; *Bryan v. Uland* [1885], 101 Ind. 477; Rawle, Covenants (5th ed.) §250.”

The following language in the case of *Ellis v. Bassett*, *supra*, at page 120, is particularly applicable to this case: “A right of way, upon a severance of the estate by partition between heirs, sometimes arises when it would not exist in case of a conveyance of one portion of the premises. And it may be laid down as a general rule that a partition of real estate among heirs carries with it by implication the same right of way from one part to and over the other as had been plainly and obviously enjoyed by the common ancestor, in so far as it is reasonably necessary for the enjoyment of each part. *Goodall v. Godfrey* [1880], 53 Vt. 219, 38 Am. Rep. 671; *Collins v. Prentice* [1842], 15 Conn. 39, 38 Am. Dec. 61; *Burwell v. Hobson* [1855], 12 Gratt. 322, 65 Am. Dec. 247; *Kilgour v. Ashcom* [1820], 5 Harr. & J. 82; *Scymour v. Lewis* [1861], 13 N. J. Eq. 439, 78 Am. Dec. 108; *Elliott v. Salle* [1862], 14 Ohio St. 10. Where the owner of an estate imposes upon one part an apparent and obvious servitude in favor of another, and at the time of the severance of ownership such servitude is in use, and is reasonably necessary for the fair enjoyment of the other, then, whether the severance is by voluntary alienation or by judicial proceedings, the use is continued by operation of law. *John Hancock Mut. Life Ins. Co. v. Patterson* [1885], 103 Ind. 582, 53 Am. Rep. 550.”

Appellant insists that the mention of other easements in the deeds of appellee and her brother John imports the ex-

clusion of the easement in question, under the general

13. rule that the express mention of one thing implies the exclusion of another. To apply this rule to the

case here presented would be to give it a scope and latitude never intended. As a general rule, where the thing omitted is of the same class and kind as those expressed, and where the same complete and effectual disposition or control thereof may be exercised by the parties to the instrument, the expression of one or more implies the exclusion of the others; but in this case, the easement omitted is not of the same class and kind as the easements mentioned. The easement omitted is one that affected lands other than the lands conveyed by the deeds in question, and one in which parties other than the heirs of John Rhodes, Sr., were interested. Appellant was not a party to the partition of the lands that the deeds in question attempted to partition, and any mention of the easement in the deeds in question could have in nowise affected appellant's rights therein, or the rights of any one other than those among whom the partition is made. Nor is there anything to show that the easements quitclaimed by the deeds were of the same class and kind as the omitted easement.

So far as these easements mentioned are concerned, the proof does not disclose whether they were appurtenant to the land, and would have passed by the conveyance of the dominant estate. They may have stood upon an entirely different footing from the omitted easement, and it may have been necessary to mention them in order that title thereto might pass, whereas it was not necessary to mention the easement in question to pass the title thereto, provided, of course, that we are correct in our conclusion that the jury was warranted in finding that this easement was appurtenant to the land.

The heirs of decedent attempted to quitclaim to each other only such easements as they themselves controlled. The easement over appellant's land they could not control and an attempted conveyance or release and quitclaim thereof, so far as it affected appellant's land, would have been a

nullity. Such quitclaim deed could have affected only the interest the heirs had inherited through their father, and if they inherited no interest in the easement, then the quitclaim deed thereto would have conveyed no interest. If they did inherit such interest in the easement, it, so far as the land conveyed was concerned, passed with the estate, to which it was appurtenant, and would not, under the decisions before cited, be held to pass by the quitclaim deed, even if the easement had been mentioned therein. Certainly, if under the law, title to the easement in such a case would not pass by virtue of the quitclaim deed, when the easement was mentioned therein, it could not be said that a failure to mention the easement operated as a relinquishment thereof. Appellee's brother did not so treat said conveyance, nor did any of the other owners of the land over which the easement in question passes, except appellant. All except appellant are conceding and agreeing that the easement exists in favor of appellee. We think it clear, under the authorities cited, that the finding by the jury that appellee was a party to the partition deeds in question, and failed to have mentioned therein the easement in question, is not in such irreconcilable conflict with the general verdict as to prevail against it.

Judgment affirmed.

McKEON v. EHRINGER.

[No. 7,303. Filed June 28, 1911.]

1. **INSURANCE.—*Mutual Benefit.—Beneficiaries.—Complaint.***—A complaint by the party named as the beneficiary in the certificate of a mutual benefit society, against such society and a contesting beneficiary claiming under a different benefit certificate, is not bad as to such contesting beneficiary, though it would be as to the society, for failing to allege that the plaintiff and the assured had done all things required of them to be performed, or the facts showing that they had performed such conditions.
p. 229.

McKeon v. Ehringer—48 Ind. App. 226.

2. **INSURANCE.—Mutual Benefit.—Beneficiaries.—Volunteers.—**A mere volunteer beneficiary of a mutual benefit certificate on the life of another, acquires no vested right therein until the death of the assured. p. 232.
3. **INSURANCE.—Mutual Benefit.—Beneficiaries.—Equitable Rights of.—**Where a daughter agreed with her father to pay his assessments in a benefit society in consideration of his making her the beneficiary of his certificate therein, and she performed her agreement, he cannot, without her consent, substitute another as the beneficiary thereof. *Bunyan v. Reed*, 34 Ind. App. 295, distinguished. p. 232.

From Floyd Circuit Court; *William C. Utz*, Judge.

Action by Martha C. Ehringer against Sarah D. McKeon and another. From a judgment for plaintiff, defendant Sarah D. McKeon appeals. *Affirmed*.

James K. Marsh and *A. Dowling*, for appellant.

James W. Fortune and *George H. Hester*, for appellee.

LAIRY, C. J.—Appellant is the widow and appellee is the daughter of Alexander McKeon. This action grows out of a controversy over the proceeds of a benefit certificate for \$2,000, issued by the Supreme Lodge, Knights and Ladies of Honor upon the life of said Alexander McKeon, which certificate, as originally issued, provided that it should be payable to Martha C. Ehringer, and was dated August 25, 1891. At and prior to the date of the issue of this certificate, it was agreed between said Alexander McKeon and his daughter that, in consideration of her being named as beneficiary in such certificate, she would pay all dues and assessments to be made against him as a member of such mutual benefit association. In pursuance of this agreement, appellee paid all the dues, assessments and charges against this certificate of membership from the time it was issued in August, 1891, to the date of the death of Alexander McKeon, which occurred on April 17, 1907, amounting to \$1,356. After this certificate was issued, Alexander McKeon married appellant, and after said marriage he took steps to have the beneficiary in said certificate changed, so as to make his

wife, Sarah D. McKeon, the beneficiary in the place of his daughter, as first named. The constitution of the Supreme Lodge, Knights and Ladies of Honor, providing for a change of beneficiaries, was as follows:

“Section 5.—Lost. If the benefit certificate of a member be lost, or beyond his control, the member may, in writing, surrender all claims thereto, and direct that a new certificate be issued to him payable to the same or other beneficiary, in accordance with the laws of this order, upon making affidavit of the facts and paying a fee of fifty cents to be forwarded by the subordinate lodge, with the affidavit, to the supreme reporter. The issuing of such new benefit certificate shall cancel and render null and void any and all previous certificates issued to such member.

Section 7.—Change of Beneficiaries. A member desiring to change his beneficiary may, at any time, while in good standing, surrender his benefit certificate, which, together with a fee of fifty cents, shall be forwarded by his lodge, under seal, to the supreme reporter, who shall thereupon cancel the old certificate and issue a new one in lieu thereof to such member, payable as he shall have directed, within the limitations as prescribed by the laws of the order. Said surrender and direction shall be made on the back of the benefit certificate surrendered, signed by the member and attested by the dictator and reporter under the seal of the lodge.”

The certificate originally issued was in the possession of appellee at the time McKeon desired to have the beneficiary therein changed. He therefore made the affidavit provided for in section five of the constitution, and forwarded this to the supreme lodge, together with a written surrender of all interest in the certificate, and a request that a new certificate be issued, naming his wife, Sarah D. McKeon, as beneficiary. This was done on April 15, 1907, and the death of Alexander McKeon occurred two days later. The certificate was reissued, in obedience to his request, with his wife as beneficiary, on April 18, 1907, one day after his death.

Both appellant and appellee claim the money due on this

certificate. The supreme lodge did not contest its liability; but paid the money into court.

The questions of law presented arise upon the pleadings. These pleadings are numerous and lengthy, and cannot be set out without unduly extending this opinion. The principal facts admitted by demurrers have been set out, and a brief statement of the pleadings will be sufficient to show how the questions are presented for decision.

Appellee filed a complaint against the lodge and appellant, based upon the certificate dated August 25, 1891, in which she set out the contract between herself and her father, which provided that she should pay all dues and assessments against said benefit certificate, in consideration that she should be made the beneficiary thereunder, and alleging that she had fully performed the contract on her part.

We need not set out the allegations of the complaint in full, for the reason that its sufficiency was not questioned by defendant lodge, and was objected to by defendant

1. Sarah D. McKeon, upon only one ground, which can be determined without further reference to the complaint. Appellant takes the position that her demurrer to the complaint should have been sustained, for the reason that it contains no allegation that decedent and the beneficiary had performed all the conditions of said benefit certificate on their part to be performed, and contained no specific averment of facts showing the performance of such conditions. It is true that a complaint, based upon an insurance policy or benefit certificate, containing conditions, must contain the general averment that all the conditions precedent to a right to bring the action have been performed, or it must show by specific averments the facts constituting such performance, or a legal excuse for nonperformance. A complaint that contains no such averments is insufficient as against the company or association issuing such contract. *Home Ins. Co. v. Duke* (1873), 43 Ind. 418; *Grand Lodge, etc., v. Hall* (1903), 31 Ind. App. 107.

If defendant lodge had demurred to this complaint, and presented this objection, a different question would be raised, but defendant Sarah D. McKeon was in no position to raise this objection to the complaint. She was not a party to the contract sued on, the conditions therein contained were not imposed for her benefit, and her rights, if any, did not depend to any extent upon their performance. Whatever rights she had were created by and depended upon the benefit certificate dated April 18, 1907, in which she was named as beneficiary, and upon which she based her affirmative paragraphs of answer and her cross-complaint. The demurrer of this defendant to the complaint was properly overruled. *Carter v. Carter* (1905), 35 Ind. App. 73; *Munhall v. Daly* (1890), 37 Ill. App. 628.

After the demurrer to the complaint was overruled, appellant filed an answer in two paragraphs, the first of which was a general denial. Appellee demurred to the second paragraph, which demurrer was sustained, and this ruling of the court is assigned as error.

The second paragraph of answer admits that a benefit certificate for the sum of \$2,000 was issued by defendant lodge on August 25, 1891, to Alexander McKeon; that his daughter, Martha C. Ehringer, was named therein as beneficiary; that he was a member in good standing of said lodge at the time said certificate was issued, and that he continued to be a member in good standing until the date of his death, on April 17, 1907; that from the date said certificate was issued until the time of his death he was a contributor to the widows' and orphans' fund of said lodge. The answer then alleges that prior to the death of Alexander McKeon he made a request to the Supreme Lodge, Knights and Ladies of Honor, in accordance with the constitution of said lodge, for a change of beneficiary; that, in obedience to said request, a new certificate was issued by said lodge, in which Sarah D. McKeon, who was then his wife, was named as beneficiary, and the certificate issued on August 25, 1891,

was canceled by said lodge. This last certificate is set out as an exhibit to this paragraph of answer, and it is averred that such certificate was in full force and effect at the time of the death of Alexander McKeon.

The allegations of the complaint, showing the contract between McKeon and his daughter, whereby it was agreed that she should be made the beneficiary under such certificate, in consideration that she should pay all dues and assessments to be made on such certificate, and the performance of such contract by her, are not denied in this paragraph of answer; but appellant claims that the facts averred in reference to the change of beneficiary during the lifetime of McKeon, in accordance with the provisions of the constitution of said lodge, are sufficient to avoid those averments of the complaint, and to show that appellee had no interest in the fund arising from said benefit certificate, even though the contract and its performance on the part of appellee be admitted as averred.

Appellant also filed a cross-complaint, based on the certificate, dated April 18, 1907. Appellee filed an affirmative answer in two paragraphs to this cross-complaint. Appellant filed a demurrer to each of these paragraphs of affirmative answer, which demurrers were overruled by the court. The question presented by this ruling is the same as that presented by the action of the court in sustaining appellee's demurrer to the affirmative paragraph of answer to the complaint, and is presented in the same way. The trial resulted in a judgment for appellee.

The question thus presented is, Did the contract existing between Alexander McKeon and his daughter, as alleged in the complaint, confer upon her such an equitable interest in the proceeds of the certificate as would estop him from substituting in her place a second beneficiary, who was a mere volunteer, having no equities in her favor?

The general rule seems to be that a person who is a mere volunteer beneficiary, named in the certificate issued by a

mutual benefit society upon the life of one of its
2. members, acquires no vested right in the proceeds of such certificate until the death of the member occurs. *Masonic, etc., Soc. v. Burkhart* (1887), 110 Ind. 189; *Presbyterian Mut. Assur. Fund v. Allen* (1886), 106 Ind. 593; *Bunyan v. Reed* (1904), 34 Ind. App. 295; *Milner v. Bowman* (1889), 119 Ind. 448, 5 L. R. A. 95; *Sabin v. Phinney* (1892), 134 N. Y. 423, 31 N. E. 1087, 30 Am. St. 681.

Where, however, a contract exists between the member of a mutual benefit society, on whose life a benefit certificate has been issued, and the beneficiary named therein,
3. whereby it has been agreed that said beneficiary should be named in such certificate, on consideration that he would pay the dues and assessments on such benefit certificate, or that he would render to such member some other valuable consideration therefor, and where such contract has been fully performed, and such consideration rendered on the part of the beneficiary, the courts recognize the equities arising in favor of such a beneficiary, and will protect them as against a person who has been substituted as a beneficiary, and who has no superior equities in his favor. *Carter v. Carter, supra*; *Maynard v. Vanderwerker* (1893), 30 Abb. New Cas. 134, 24 N. Y. Supp. 932; *McGrew v. McGrew* (1901), 190 Ill. 604, 60 N. E. 861; *Stronge v. Supreme Lodge, etc.* (1907), 189 N. Y. 346, 82 N. E. 433, 12 L. R. A. (U. S.) 1206, 121 Am. St. 902; *Jory v. Supreme Council, etc.* (1894), 105 Cal. 20, 38 Pac. 524, 26 L. R. A. 733, 45 Am. St. 17; *Leaf v. Leaf* (1891), 92 Ky. 166, 17 S. W. 354; *Supreme Council, etc., v. Murphy* (1903), 65 N. J. Eq. 60, 55 Atl. 497.

This proposition seems to be abundantly sustained by the authorities. In the case of *Stronge v. Supreme Lodge, etc., supra*, the court in discussing a case of this kind says: "Thus assuming that a contract was made by a member for a valuable consideration to take out a certificate for the benefit of appellant, it seems to us very clear that after the certifi-

cate has been taken out and the consideration fully furnished by the beneficiary, the member will not be allowed to destroy the rights of his creditor by a new certificate naming a new beneficiary. We do not regard the by-laws and provisions of the certificate or the authorities called to our attention providing for and upholding the right of a member to change the designation of his beneficiary as often as desired without the consent of the latter as at all applicable to such a case as this. They relate to a case where a voluntary and gratuitous designation has been made of a beneficiary who, in the language of the certificate, has acquired 'no interest whatever in the certificate nor in the indemnity fund.' But can there be any doubt that a member of one of these associations might say to a person that if the latter would loan him \$1,000 he, the member, would take out a certificate designating the creditor as beneficiary as security for such loan, such designation not to be canceled or changed without the consent of the creditor, and that this contract and agreement would estop and prevent the member from changing the designation whatever might be the ordinary privileges and regulations as between him and the association when no rights of a third party had intervened? While the agreement detailed by appellant is not in terms as complete as the one assumed, we think it is just as effective, because what the parties have omitted specifically to say as between themselves the law says for them. Irvine agreed that he would procure the certificate to be issued designating appellant as beneficiary if she and her husband would establish a new home, take him with them and care for and nurse him in his sickness. The appellant performed her part of the contract and Irvine performed his so far as procuring the certificate to be issued was concerned, and the law now prohibits him from destroying the rights which appellant has acquired in the certificate for a valuable consideration."

The case of *McGrew v. McGrew*, *supra*, is very similar to the case at bar. In deciding that case the supreme court of

Illinois used the following language: "The law is well settled in this state that a member of a fraternal beneficiary society, where no intervening rights have attached, may at his pleasure surrender his benefit certificate, and have a new certificate issued and designate therein a new beneficiary, and that a beneficiary has no vested rights in the certificate during the life of the member by reason of the fact that he has been named as a beneficiary in such certificate. *Martin v. Stubbings* [1888], 126 Ill. 387, 18 N. E. 657, 9 Am. St. 620; *Benton v. Brotherhood, etc.* [1893], 146 Ill. 570, 34 N. E. 939; *Voigt v. Kersten* [1896], 164 Ill. 314, 45 N. E. 543; *Delaney v. Delaney* [1898], 175 Ill. 187, 51 N. E. 961. While at law said certificate is not assignable, in equity a beneficial interest may be transferred therein, which will be protected by a court of chancery. *Supreme Council, etc., v. Tracy* [1892], 169 Ill. 123, 48 N. E. 401. In this case, McGrew caused the appellee, his daughter, to be named in the second certificate as beneficiary, delivered the certificate to her, and agreed with her that upon his death she was to be paid back the amount which she had advanced to him, from the moneys received from said society upon said certificate. After this agreement was made, the money paid and the certificate delivered to appellee, as between McGrew and appellee he had no right to surrender said certificate and have a new one issued in lieu thereof, made payable to the appellant. In the case of *Supreme Council, etc., v. Tracy, supra*, Tracy, who was a member of the Royal Arcanum, in consideration of a cash loan from his wife caused her to be made the beneficiary in his certificate, which was delivered to and retained by her, she paying all the assessments thereon. Afterwards he made a false affidavit that the certificate was lost and procured from the society a duplicate certificate, naming his daughters as beneficiaries. On page 128 the court said: 'After this agreement was made, the money paid, and the certificate turned over, as between Tracy and his wife he had no right whatever to surrender the certificate

and have the organization make out a new one payable to another party, and his attempt to do so, based upon a false affidavit, was a fraud on the organization and upon his wife; and his daughters, who were mere volunteers, having advanced nothing, cannot profit by the fraud of Tracy, attempted to be practiced on his wife.' "

The supreme court of California, in deciding the case of *Jory v. Supreme Council, etc., supra*, used the following language: "The principle here under consideration is the most recent growth of mutual benefit association law, a branch of the law which in itself is young in years; and we know of nothing in the law which deprives a person contemplating membership in a mutual benefit association from so contracting with the proposed beneficiary as that when such certificate is issued, equities in favor of the beneficiary are born of such merit that the insured member has no power to defeat them. The few authorities shedding light upon this question declare the rights of the beneficiary are such as to create a vested interest in the proceeds of the certificate. *Smith v. National Benefit Soc.* [1890], 123 N. Y. 85, 25 N. E. 197, 9 L. R. A. 616; *Maynard v. Vanderwerker* [1893], 30 Abb. New Cas. 134, 24 N. Y. Supp. 932. Possibly this is not a correct declaration of the principle of law applicable to the conditions; for a second beneficiary might be substituted, wholly innocent of the contractual relations existing between the insured and the first beneficiary, and his substitution give rise to the creation of equities in his behalf, all controlling upon a judicial disposition of the rights of the parties concerned. If the original beneficiary's interest was vested, no subsequent conditions could possibly arise which would defeat his right, and for this reason we think it can hardly be termed a vested interest. The whole matter seems to be rather a question of equities, and the stronger and better equity must prevail. The illustration we have used does not arise in the present case, for we here have no clash of equities. The second beneficiary possesses

no equities. He is a volunteer, pure and simple. His status during the life of the insured is well described in *Smith v. National Benefit Soc., supra*, where the court said: 'The designation was in the nature of an inchoate or unexecuted gift, revocable at any moment by the donor, and wholly within his control.' We think a court of equity should declare the insured estopped from substituting a second beneficiary of the character here involved, whenever sound equities are extant in favor of the first beneficiary; and, such estoppel being in force against the insured, it is equally in force and may be successfully urged against the volunteer beneficiary. The respondent is a volunteer beneficiary, and it only remains for us to ascertain from the record what the appellant's equities are, as disclosed by the evidence. She claims by her answer that she and her mother entered into a mutual agreement, whereby each should join a mutual benefit society and make the other a beneficiary under the certificates issued, and that said agreement was carried out. Appellant further alleges that she paid all initiation fees, dues, and assessments upon the benefit certificate taken out by her mother. If these moneys were paid out by appellant under and by virtue of a contract between the parties, and in pursuance of this agreement and scheme for mutual insurance, then she has equities which entitle her to recognition in a court of justice, for it would be a gross imposition and fraud upon her to allow the insured to change her beneficiary under these circumstances.'"

This court in the case of *Carter v. Carter, supra*, adopted the rule announced, and applied it to a case very similar to the one under consideration.

Appellant cites and relies upon the case of *Bunyan v. Reed, supra*. In that case a member of a mutual benefit society was indebted to his brother in the sum of \$3,000. He procured a benefit certificate on his life for the sum of \$5,000, in which his brother, to whom he was indebted, was named as a beneficiary to the extent of \$3,000, and two of

his sisters were also named as beneficiaries to the extent of \$1,000 each. The purpose of naming the brother as beneficiary in the amount fixed was to secure to him the payment of the money due to him. The by-laws of the society provided that where two or more beneficiaries were named in a certificate, and one or more of such beneficiaries died prior to the death of the member on whose life the certificate was issued, the survivor or survivors of such beneficiaries should receive the entire benefit. The brother named as beneficiary died before the member, and it was held that the surviving beneficiaries were entitled to receive the entire benefit provided for in the certificate, notwithstanding the equities in favor of the estate of the deceased brother.

That case differs somewhat from the case under consideration. In that case the member did nothing to defeat the rights of his brother under the contract. The by-law providing that the surviving beneficiaries should receive the entire proceeds of the certificate was in force at the time the contract was entered into. No change took place either in the by-laws of the order, or in the form of the certificate, between the time the contract was made and the time the certificate became payable. The interest of the creditor brother in the proceeds of the certificate was lost, not by any act of the member or of the society issuing the certificate, but by operation of law. The contract entered into between the brothers, when construed in the light of the existing by-law of the society, gave to the one who was named as beneficiary no right in the proceeds of the certificate in the event he died prior to the death of the brother on whose life the certificate was issued. We do not regard the decision in that case as being in conflict with the conclusion reached in the case under consideration.

Judgment affirmed.

NIAGARA OIL COMPANY v. JACKSON ET AL.

[No. 6,623. Filed May 18, 1910. Rehearing denied December 30, 1910. Transfer denied June 28, 1911.]

1. **TORTS.—Use of Property.—Damages.**—The owner of property has a right to use it in a reasonable manner, and if in the use thereof incidental injury is done to another, no recompense can be demanded therefor. p. 241.
2. **NUISANCE.—Trespass.—Overflowing Mineral Waters.—Damages.**—The operator of a gas well or oil well, who suffers salt water therefrom to overflow his neighbor's land, destroying its fertility and the vegetation thereon, is liable therefor. p. 241.
3. **WATERS.—Surface.—Artificial Flowage.—Damages.**—The owner of land over which surface-waters naturally flow has no cause of action therefor, but he has a cause of action where the overflowing waters have been artificially collected and discharged upon such land. p. 242.
4. **WATERS.—Streams.—Pollution.—Cities.**—While lower riparian owners have been held remediless in cases where streams have been polluted by upper proprietors, or cities, the conservation of the public health requires that such holdings should be largely restricted; and cities have no right to cast polluted water on the surface so that it will flow upon a servient owner's land. p. 242.
5. **NUISANCE.—Contributory Negligence.**—Contributory negligence constitutes no defense to an action for maintaining a nuisance. p. 244.
6. **NUISANCE.—Negligence.—Discharging Collected Waters.—Complaint.**—A complaint alleging that defendant in operating its oil and gas well discharged saline waters upon plaintiff's land, thereby destroying its fertility and vegetation, states a cause of action regardless of any allegations of negligence therein contained. p. 245.
7. **VENUE.—Change of.—Effect.**—The court to which a cause of action has been transferred by a change of venue has sole jurisdiction thereof and should proceed with the case as though such case had originated in such court. p. 245.
8. **PARTIES.—Additional, on Change of Venue.**—A plaintiff, after a change of venue from the county has been granted, may amend his complaint by adding new parties, though such parties live in the county from which the case was taken. p. 246.
9. **NUISANCE.—Continuance of.—Damages.**—A nuisance constitutes a continuing offense and gives rise to damages in plaintiff's favor as long as it continues. p. 246.
10. **NUISANCE.—Damages.—For What Time Assessed.—Supplemental Complaint.**—Ordinarily damages can be awarded only to

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the time of the commencement of an action, but in an action for nuisance a supplemental complaint may be filed for damages accruing after the filing of the complaint, and in that way damages may be recovered up to the time of the trial. p. 247.

11. PLEADING.—*Complaint.—Supplemental.*—The original and the supplemental complaint constitute the complaint in a cause, the supplemental complaint merely bringing forward the matters accruing after the filing of the original complaint. p. 247.

From Delaware Circuit Court; *Joseph G. Leffler*, Judge.

Action by Charles Jackson and another against the Niagara Oil Company. From a judgment for plaintiffs, defendant appeals. *Affirmed.*

Simmons & Dailey, L. B. Simmons and F. A. Shaw, for appellant.

W. A. Thompson and W. H. Thompson, for appellees.

HADLEY, J.—Appellees were the owners as tenants by the entirety of a tract of land in Randolph county, Indiana. Appellant was the owner of an oil and gas lease on an adjacent tract. Appellee Charles Jackson instituted this action against appellant to recover damages for injuries claimed to have been caused to said real estate by salt water from one of appellant's wells. A change of venue was taken to the Delaware Circuit Court, in which court, on motion of Charles Jackson and on petition by Cora B. Jackson, she was made a party plaintiff.

The amended complaint, upon which the case was tried, avers, in substance, that Orlie Jones owns a tract of land in Randolph county; that appellees' land adjoined the Jones land on the east; that the Jones land was higher, and sloped towards the land of appellees, and the surface-water on the Jones land naturally flowed down upon the land of appellees; that Jones leased his land to appellant for the purpose of producing gas and oil; that appellant put down thereon a great number of wells to a great depth, and pumped, and continues to pump, therefrom large quantities of oil and water strongly impregnated with salt and with noxious and poisonous minerals, which it discharged upon

said land, and pumped great quantities of oil and water, impregnated as aforesaid, into tanks on said land, and carelessly, negligently and wrongfully permitted said water and oil to be discharged from said tanks, and carelessly, negligently and wrongfully permitted said water, so pumped onto said land and discharged from said tanks, to flow down upon appellees' land, and form a pond near appellees' house and home, thereby destroying the vegetation, rendering the land sterile, and the habitation of appellees unhealthful and uncomfortable; that at an inconsiderable cost, appellant could have prevented said water and refuse oil from so flowing upon appellees' land, and could have cared for said water and oil, without injury to appellees or other citizens. To this complaint appellant demurred for want of facts, which demurrer was overruled.

Appellant answered in three paragraphs. The first was a general denial; the second, after admitting the putting down of the wells and the operation thereof, as charged, averred that said wells were drilled to the proper and ordinary depth for the production of oil, in the most skilful way; that said wells were operated and said oil was produced in the most skilful manner; that appellant was never guilty of any negligence in operating said wells, or in producing oil therefrom, or in allowing oil or salt water to escape; that said water, when produced, was allowed by appellant to flow upon the ground, and was allowed to seek its course and escape by its own volition, and that it coursed its way by its own volition, and went upon the lands of appellees, because the land upon which the appellant was operating its said wells was higher than the lands of appellees; that there was no method by which oils could be produced from said wells without the production of salt water, and that said wells could not be operated for oil unless said salt water was allowed to run on the lands of appellees; that any damage thereby caused was absolutely necessary, and could not be

avoided by appellant; that appellant had no intention of injuring appellees.

Appellant insists that the complaint is insufficient, for the reason that what it did was necessary in the exercise of its rights under the lease; that nature had placed the

1. oil there, and there it had to be taken out, and if in so doing appellant incidentally injured another, it was the other's misfortune, for which he was entitled to no recompense. We cannot affirm this doctrine. One is entitled to a reasonable use of his property, even if such use incidentally injures his neighbor; but liability for such injury will attach when the use becomes unreasonable. *Ohio Oil Co. v. Westfall* (1909), 43 Ind. App. 661; *Columbus, etc., Iron Co. v. Tucker* (1891), 48 Ohio St. 41, 26 N. E. 630, 12 L. R. A. 577, 29 Am. St. 528.

Sic utere tuo ut alienum non laedas—"So use thine own that another you may not injure"—is an ancient rule of property, well established in authority and equity; but

2. it has been greatly circumscribed in later years by the influence of selfish greed under the mask of *pro bono publico*. However, we are of the opinion that enough of the rule remains to prevent one from so using his property for his profit as practically to confiscate or destroy his adjoining neighbor's property, where, as here averred, such injury could be prevented at an inconsiderable cost. And if he does so use his property, under such circumstances, and inflicts such injury, he should be compelled to respond in damages, for it can hardly be said that such a use is a reasonable one. *Pfeiffer v. Brown* (1895), 165 Pa. St. 267, 30 Atl. 844, 44 Am. St. 660; *Ohio Oil Co. v. Westfall, supra*; *Cahill v. Eastman* (1872), 18 Minn. 324, 10 Am. Rep. 184; *Fletcher v. Rylands* (1866), L. R. 1 Ex. *265.

In the case last cited, which is the leading case on this subject, the rule is laid down as follows: "We think that the true rule of law is, that the person who for his own

purposes brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape. * * * It seems but reasonable and just that the neighbor, who has brought something on his own property which was not naturally there, harmless to others so long as it is confined to his own property, but which he knows to be mischievous if it gets on his neighbor's, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property. But for his act in bringing it there no mischief could have accrued, and it seems but just that he should at his peril keep it there so that no mischief may accrue, or answer for the natural and anticipated consequence. And upon authority, this we think is established to be the law whether the things so brought be beasts, or water, or filth, or stench."

Appellees' land is servient to the surface flowage of the Jones land, which nature casts upon it, contaminated by deleterious matter, with which a reasonable use of the

3. Jones land might impregnate it; but it is not servient to an unreasonable artificial surface flowage, or to surface flowage collected into artificial channels and cast upon it. *Pfeiffer v. Brown, supra*; *Anderson v. Drake* (1909), 24 S. Dak. 216, 123 N. W. 673; *Templeton v. Voshloe* (1880), 72 Ind. 134, 37 Am. Rep. 150; *City of Garrett v. Winterich* (1909), 44 Ind. App. 322; *Buchanan's Trustees v. Montgomerie* (1853), 2 Stuart 519; *Bellows v. Sackett* (1853), 15 Barb. 96; *Smith v. Fletcher* (1872), L. R. 7 Ex. 305; *Fletcher v. Rylands, supra*.

The principle governing the cases of *Barnard v. Sherley* (1893), 135 Ind. 547, 24 L. R. A. 568, 41 Am. St. 454, *Weston Paper Co. v. Pope* (1900), 155 Ind. 394, 56

4. L. R. A. 899, and *Pennsylvania Coal Co. v. Sanderson* (1886), 113 Pa. St. 126, 6 Atl. 453, 57 Am. Rep. 445,

is not applicable. In each of those cases the injury was caused to riparian owners by the contamination of water in watercourses. Such watercourses are in the nature of natural sewers to carry off accumulated waters and deleterious substances, and riparian owners take their position on the banks of watercourses with notice that such position is superior to those below them and inferior to those above them, that farms, cities and villages may gather along the banks, and that impurities, incident to population, trades and agriculture, that fall upon the surface, will in some way be cast into the stream, and said owners' enjoyment of it thus modified. *City of Valparaiso v. Hagen* (1899), 153 Ind. 337, 48 L. R. A. 707, 74 Am. St. 305.

A city may, under certain circumstances, when necessary for the purpose of sanitation, discharge its sewage into a natural watercourse, and thus render its pure waters impure, to the injury of lower riparian owners, without liability for such injury. *City of Richmond v. Test* (1897), 18 Ind. App. 482; *City of Valparaiso v. Hagen, supra*.

The development of the country and the rapid growth of cities and towns, with their consequent accumulation of filth and sewage, which is being cast into the ponds, streams and watercourses, to the great danger of the public health, has produced a condition that calls for a restriction, if not an abridgment, of the rules laid down in the cases of *City of Richmond v. Test, supra*, and *City of Valparaiso v. Hagen, supra*. And in this connection attention is called to an act for the protection of streams, enacted by the General Assembly of 1909 (Acts 1909 p. 60). But notwithstanding the various enlargements, in other respects, of the general rule, the law still is, that a city has not the right to collect its surface and subterranean waters into sewers, impregnate them with its filth and sewage, and cast them upon the surface of its land where, by the laws of gravitation, they flow not by watercourses, but upon the surface onto the lower adjoining lands, and render them unfit for cultivation and habitation. *City*

of *Lebanon v. Twiford* (1895), 13 Ind. App. 384; *City of Garrett v. Winterich*, *supra*; *Phinizy v. City Council*, etc. (1872), 47 Ga. 260.

For the foregoing reasons, we hold that the averments of the complaint show a liability of appellant to appellees for the injuries charged.

It is also urged that the complaint is insufficient for the reason that it does not aver that appellees were free
5. from contributory fault. The complaint charges the creation and maintenance of a nuisance. §291 Burns 1908, §289 R. S. 1881.

This is an active, aggressive wrong, and contributory negligence does not enter into the question of liability. *City of Lebanon v. Twiford*, *supra*; *Muncie Pulp Co. v. Martin* (1899), 23 Ind. App. 558; *Williamson v. Yingling* (1881), 80 Ind. 379; *T. A. Snider Preserve Co. v. Beemon* (1901), 22 Ky. Law 1527, 60 S. W. 849; *Paddock v. Somes* (1890), 102 Mo. 226, 14 S. W. 746, 10 L. R. A. 254.

In the cases of *T. A. Snider Preserve Co. v. Beemon*, *supra*, and *Paddock v. Somes*, *supra*, the following from Wood, Nuisances (2d ed.) §435, is quoted with approval: "Neither does it make any difference or in any measure operate as an excuse that the nuisance cannot be obviated without great expense, or that the plaintiff himself could obviate the injury at a trifling expense. It is the duty of every person or public body to prevent a nuisance, and the fact that the person injured could, but does not, prevent damages to his property therefrom, is no defense either to an action at law or in equity. A party is not bound to expend a dollar, or do any act to secure for himself the exercise or enjoyment of a legal right of which he is deprived by reason of the wrongful acts of another." The law of contributory negligence has no more place in an action of this sort than has the law of self-defense.

In this case the complaint charges that the positive act of bringing the impregnated subterranean waters in great

quantities to the surface, and discharging them upon
6. the surface where, by the laws of gravitation, they must flow upon appellees' land, and the negligent act, of failing to prevent this natural course of flow, combined, created the nuisance, the maintenance of which constituted a positive wrong for which contributory negligence can have no part in fixing liability. In fact, the averments of negligence on the part of appellant may be considered as surplusage, eliminating all charge of negligence on the part of appellant. The complaint states facts sufficient to constitute a cause of action. *Ohio Oil Co. v. Westfall, supra.*

Complaint is made that the court had no jurisdiction of the subject-matter. The land was owned by appellees as tenants by the entirety, and was situated in Randolph
7. county, as was also the land upon which appellant had its lease. Appellee Charles Jackson instituted this suit in Randolph county, afterwards it was venued to Delaware county. Here appellees petitioned the court for leave to amend the complaint, and asked that Cora B. Jackson be made a party. This request was granted, and an amended complaint, in all essential particulars the same as the original complaint, except that Cora B. Jackson was joined with Charles Jackson as plaintiff, was filed, over the objection of appellant. Of course the venue of the action was originally in Randolph county. Appellee Charles Jackson's complaint in the Randolph Circuit Court was sufficient to invoke the jurisdiction of that court over the subject-matter. *Sheridan Gas, etc., Co. v. Pearson* (1898), 19 Ind. App. 252.

Under the statute, when a cause is venued from one county to another, the clerk of the proper court of the latter county shall receive the transcript and papers, docket the action in its order among the other causes, and the cause shall be tried, or otherwise disposed of, in the same manner as if it originated in said court (§424 Burns 1908, §413 R. S. 1881), and the latter court has whole and sole jurisdiction

over such cause. *Foster v. Potter* (1865), 24 Ind. 363; *Toledo, etc., R. Co. v. Wright* (1879), 68 Ind. 586, 34 Am. Rep. 277.

After the change was made, the venue of the cause of action was in the Delaware Circuit Court, and that court had the same jurisdiction and power to make any order or ruling that it would have had, had the case been properly brought in said court in the first instance (4 Ency. Pl. and Pr. 487), and even after change of parties (*State v. Hays* [1885], 88 Mo. 344; *R. E. Stafford & Co. v. L. & H. Blum* [1894], 7 Tex. Civ. App. 283, 27 S. W. 12) and irrespective of the residence of the parties (*East St. Louis, etc., R. Co. v. Enright* [1893], 47 Ill. App. 494).

If the amendment and addition, as here made, could properly be made in a case originating in said court, the same amendment and addition could be made in a cause brought there on a change of venue. The amendment made no new cause of action, and required no new defense, and therefore was one that properly might be made. 1 Hogate, Pl. and Pr. §606.

Complaint is made of the giving of instruction fifteen. By this instruction the jury was told that in assessing damages it should consider the difference in the fair rental value of the farm of appellees from January 1, 1905, to October 16, 1906. The objection to this instruction is that it authorized the jury to assess damages accruing after the bringing of the action.

The original complaint in this case was filed in the Randolph Circuit Court on April 25, 1906, but on October 16, 1906, appellees filed a supplemental complaint, for the purpose of showing the continuation of the maintenance of the nuisance by appellant, as complained of in the original complaint, up to the filing of said supplemental complaint. The maintenance of a nuisance is a continuous offense, and damages may be recovered so long as such

nuisance is maintained. It is true that in an action founded on a tort the plaintiff can recover only such damages
10. as had accrued at the commencement of the action.

Musselman v. Manly (1873), 42 Ind. 462; *Maxwell v. Boyne* (1871), 36 Ind. 120. While this is true, as a general rule, we can see no reason for the application of this rule to cases like the present, where the tort is a continuous offense, and where a supplemental complaint has been filed showing the continuation of the wrong up to the time of the filing of the supplemental complaint. Supplemental pleadings are specifically authorized by our statutes. §408 Burns 1908, §399 R. S. 1881.

The purpose of such supplemental complaint is to bring into the record new facts that have accrued since the commencement of the action, so that the court may render judgment upon the facts as they exist at the time of its rendition. *Musselman v. Manly, supra*; *Pouder v. Tate* (1892), 132 Ind. 327.

The original complaint and the supplemental com-
11. plaint constitute plaintiff's complaint and cause of action. *Peters v. Banta* (1889), 120 Ind. 416; *Chapman v. Jones* (1898), 149 Ind. 434.

A supplemental complaint is not an amendment to the complaint; but its office is to bring forward a matter, proper to be litigated, along with the matters contained in the original complaint, that has accrued since the commencement of the action, and it assumes that the original complaint is to stand as it originally stood. *Chapman v. Jones, supra*; *Pouder v. Tate, supra*.

Applying these rules, it seems proper in a case like this to file a supplemental complaint, and litigate the question of damages up to the time of the filing of such supplemental complaint. This is in entire accord with the theory of the uses of the supplemental complaint. Otherwise a supplemental complaint would serve no useful purpose. There was

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no error in this instruction. For the same reasons there was no error in the refusal of the court to strike out the supplemental complaint.

The establishment of the foregoing principles determines all the other questions presented.

Judgment affirmed.

WINONA AND WARSAW RAILWAY COMPANY v.
ROUSSEAU.

[No. 6,848. Filed November 29, 1910. Rehearing denied February 14, 1911. Transfer denied June 28, 1911.]

1. NEGLIGENCE.—*Contributory.—Negating Complaint.*—It is not necessary, in a complaint for personal injuries, to negative contributory negligence. p. 250.
2. CARRIERS.—*Passengers.—Sudden Start of Cars.—Complaint.—Inferences.*—Where a complaint shows the relation of passenger and carrier between plaintiff and defendant, the duties of the carrier need not be set out, since the law fixes them; and an allegation that the defendant violently started its car, thereby throwing the plaintiff therefrom, sufficiently states a cause of action. pp. 250, 252.
3. CARRIERS.—*Passengers.—Sudden Start of Car.—Contributory Negligence.—Complaint.*—A complaint showing that the plaintiff was guilty of contributory negligence is bad on demurrer; but a complaint alleging that the plaintiff arose, preparatory to alighting from the car, and that the car started with a violent jerk, thereby throwing her therefrom, does not show contributory negligence. p. 252.
4. CARRIERS.—*Passengers.—Standing in Car.*—Where a passenger is known to be standing in a car, regardless of the reason therefor, it is the duty of the persons in charge of the car to operate it in such a manner as not to throw such passenger therefrom. p. 252.
5. CARRIERS.—*Passengers.—Standing in Car.—Contributory Negligence.*—It does not constitute contributory negligence, as a matter of law, for a passenger to stand on a moving car. p. 252.
6. CARRIERS.—*Care Toward Passengers.*—While it is not the customary duty of a motorman to look after the passengers on his

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- car, it is his duty to exercise the highest practicable degree of care in the operation of his car; and this may require him to see whether passengers are in a position of safety. pp. 252, 258.
7. DAMAGES.—*Excessive.*—*Interurban Railroads.*—Where a verdict is not so large as to indicate that the jury acted from prejudice, partiality or corruption, it will not be disturbed on appeal. p. 253.
8. APPEAL.—*Briefs.*—*Waiver.*—Points not argued are waived. p. 253.
9. CARRIERS.—*Stations.*—*Passengers.*—*Complaint.*—A complaint by a passenger of an interurban railway company, alleging that she arose in the car preparatory to alighting, that a signal to stop had been given, that the motorman negligently gave the car a sudden jerk, thereby throwing plaintiff from the car, but failing to allege that the place where she was attempting to alight was at a usual stopping place, is sufficient. p. 253.
10. CARRIERS.—*Passengers.*—*Sudden Start of Car.*—*Signal by Stranger.*—*Proximate Cause.*—*Jury.*—In an action by a passenger against an interurban railway company for negligently and suddenly starting the car with a jerk, thereby throwing her therefrom, the alleged fact that a stranger gave the signal for the motorman to proceed, is not conclusive that the proximate cause of the injury received was the giving of such signal and not the alleged negligence in starting the car with a jerk, the question being for the jury; and an instruction that on proof of such alleged fact the plaintiff could not recover, was correctly refused. pp. 255, 259, 260.
11. NEGLIGENCE.—*Evidence.*—*Inferences.*—*Appeal.*—In a negligence case, evidence of facts from which an inference of defendant's negligence arises, is sufficient to sustain a verdict, on appeal. p. 259.
12. TRIAL.—*Verdict.*—*Inferences.*—*Appeal.*—On appeal, all reasonable inferences are drawn in favor of the general verdict. p. 260.
13. TRIAL.—*Verdict.*—*Interrogatories.*—*Conflict.*—The general verdict controls the answers to the interrogatories to the jury unless they are in irreconcilable conflict therewith. p. 261.

From Elkhart Superior Court; V. W. VanFleet, Judge.

Action by Mary Rousseau against the Winona and Warsaw Railway Company. From a judgment for plaintiff, defendant appeals. *Affirmed.*

Frazer, Cook & Frazer and *Widaman & Widaman*, for appellant.

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Levi R. Stookey, T. Wayne Anglin and James M. Van-Fleet, for appellee.

WATSON, J.—The complaint in this cause is in three paragraphs. The first alleges substantially the following facts: That the Winona and Warsaw Railway Company was on August 15, 1906, a common carrier of passengers for hire; that it propelled its cars by means of electricity upon a street railway in the city of Warsaw, Kosciusko county; that on said day plaintiff took passage on one of said cars, and paid to defendant her fare as a passenger; that said car was an open one, and was in charge of a motorman and a conductor; that there was an unobstructed view of the passengers from all parts of the car; that plaintiff desired to alight from said car at the intersection of Center and Lake streets; that said car was proceeding west on Center street, and, without stopping at said intersection, proceeded south on said Lake street; that, as it thus proceeded, plaintiff heard some of the passengers call to the conductor to stop the car, and she also heard the bell ring as a signal for said motorman to stop the car; that the motorman heard said signal, and at once, in obedience thereto, began to decrease the speed of said car, which was brought almost to a stop; that plaintiff believed that said car was about to stop in obedience to said signal, and, acting upon that belief, she arose from her seat in order to alight as soon as said car should stop; that the motorman, if he had looked, or had used reasonable care and diligence in the discharge of his duties, could have seen that plaintiff was standing, preparatory to alighting from the car, and at a place from which she might be thrown from the car; that said motorman, without giving any notice or warning, then and there carelessly and negligently so applied power to said car as to cause it to move forward with a sudden jerk, and on account of said negligence of said motorman this plaintiff was thrown from said car and caused to fall upon the street, by reason of which she was greatly bruised, injured, etc.

The second paragraph alleges, in addition to the averments of the first, that the bell was rung by some person unknown to plaintiff; that she heard the bell, and understood it to be a signal to stop said car, and supposed and believed that it had been given by the conductor; that the conductor heard said signal to stop said car, and could have countermanded said signal if he had not wished to stop at said place; that he negligently failed to countermand said signal to stop, and thereby ratified and adopted it as his own.

The third paragraph alleged, in addition to the allegation of both the first and second paragraphs, that if the motorman had looked back of him through the car he could have seen plaintiff standing, but he negligently failed so to look; that, without giving any notice or warning, he suddenly increased the speed of the car and caused appellee to fall, etc.

A demurrer was addressed to each paragraph, which demurrers were overruled and exceptions taken. The trial resulted in a verdict for appellee. Upon the overruling of the motion for a new trial, the cause was appealed to this court.

The first question arises on the assignment that the court erred in overruling appellant's separate demurrer to each paragraph of appellee's amended complaint. The

1. pleadings before summarized contain much evidentiary matter, and indicate some confusion in the mind of the author as to the theory upon which he is basing his claim. It has not been necessary, since the act of 1899 (Acts 1899 p. 58, §632 Burns 1908), to negative contributory negligence in a complaint for personal injuries.

The complaint avers the relation of passenger and carrier. This being so, the obligation imposed upon the carrier is fixed by law, and the violent starting of the car in a

2. negligent manner furnishes the basis for legal liability. This is shown by each paragraph, and each was, therefore, sufficient. Of course, if the facts pleaded establish contributory negligence, the demurrers should have

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been sustained. The passenger might be guilty of
3. such negligence in leaving or attempting to leave the car at an improper place, but nothing of that kind is shown. It is shown that she arose from her seat in order to alight as soon as the car should stop, but it does not appear that she attempted to leave the car; so that it is immaterial whether the place was one at which she might properly have alighted.

It is averred that the car was negligently operated. In view of facts known to the persons in charge of the car—
one of such facts being that the appellee was standing
4. —if they knew that she was on her feet, it was their duty not to operate it in such a manner as would likely result in her being thrown off, and this duty was not affected by the reasons that may have prompted her to assume such a position.

She was quite as much a passenger as though she had been standing for lack of a place to sit, and it cannot be adjudged as a matter of law that she was guilty of con-
5. tributory negligence, merely because she was standing while the car was in motion. *Harris v. Pittsburgh, etc., R. Co.* (1904), 32 Ind. App. 600; *Pittsburgh, etc., R. Co. v. Miller* (1904), 33 Ind. App. 128; *Fort Wayne Traction Co. v. Hardendorf* (1905), 164 Ind. 403.

Each paragraph shows that the relationship of passenger and carrier existed, and avers that the car was negli-
2. gently operated, and that the passenger was thereby thrown off and injured. The demurrer was properly overruled.

It is urged that the court erred in overruling the motion for a new trial; that it is not the duty of the motorman to be looking back into his car to see what passengers are
6. doing, and that his failure to observe their positions cannot be made the basis of a charge of negligence. This is true, but it is likewise true that the motorman is not permitted carelessly and negligently to apply the power to

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the car so as to give it a sudden jerk, to the injury of a passenger, as is alleged in this cause. The law demands of the motorman the exercise of a degree of care and vigilance corresponding with the danger which may accrue to passengers from his negligence in any given particular. A high degree of care from the carrier toward the passengers is exacted by law, and the conduct of the employes in charge of the car must correspond therewith. 3 Thompson, Negligence (2d ed.) §3475. The duty of the motorman is to know that he may safely start the car, and he cannot justify a violent application of electricity, by saying that he did not know that any passenger was in a position where he was likely to be thrown off. The jury was warranted in finding that the negligence charged was the proximate cause of the injury. *Chicago, etc., R. Co. v. Martin* (1903), 31 Ind. App. 308.

The verdict for \$2,000 is not so excessive as to indicate that the jury acted from prejudice, partiality or cor-

7. ruption, and, therefore, it will not be interfered with.

Pittsburgh, etc., R. Co. v. Lightheiser (1907), 168 Ind. 438.

The assignment that the court erred in overruling
8. appellant's motion for judgment on the answers to the interrogatories, notwithstanding the general verdict, is waived where appellant fails to present any argument thereon.

We find no error, and the judgment is affirmed.

ON PETITION FOR REHEARING.

HOTTEL, J.—Counsel for appellant in their petition for a rehearing urge, with much earnestness, that the court failed to consider in the original opinion some questions that they deem vital and controlling. We therefore supplement that opinion with a consideration of those questions.

Counsel first insist that neither of the several paragraphs of complaint states sufficient facts. The only objection

9. urged in the petition for rehearing is that said paragraphs do not allege "that the place at which appellee

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desired to alight was a usual stopping place on appellant's railway."

To sustain their contention that this is a necessary allegation in each paragraph of the complaint, counsel have cited two cases, one of which relates to an injury received by a passenger in alighting from a steam railroad, caused by there being no platform at the point where the train stopped, and said passenger was injured by stepping to the ground while the train was standing; and the other case cited was a case where the passenger was ejected from the train. So it will be seen that the theory of the complaint in each case was entirely different from the theory of the several paragraphs of complaint in the case at bar. But even if it were conceded that such an allegation were necessary in a suit like this one, if brought against a steam railroad, it would not follow that such an allegation is necessary where the suit is against an electric street railway. The manner of operating steam railroads is so different from the manner of operating electric street railways, that the rules of law obtaining in the first do not always apply to the latter. The steam railroad companies usually have a schedule time upon which they operate their trains, and have fixed places for stopping to discharge and receive passengers, so that there was reason for the application of the rule contended for by counsel in the particular cases cited; but upon electric street railways, where the manner of operating the car is, in a large measure, by signal, and the places of receiving and discharging passengers, and the stopping and starting of the car for such purposes, all depend, to a great extent, on the signal, the reason for the rule ceases; and, this being true, the rule itself ceases.

The complaint alleges that a signal to stop was given, and that in obedience thereto the motorman slackened the speed of the car, and almost or quite stopped it, and that appellee, believing that the car would be stopped for the

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discharge of passengers at that point, got up, preparatory to alighting from said car. For the purposes of a suit against an electric street railway company, this allegation was the equivalent of the allegation contended for by counsel, which, in the cases cited, applies to steam railroads, and we think made the several paragraphs of complaint entirely sufficient in this regard. *Anderson v. Citizens St. R. Co.* (1895), 12 Ind. App. 194.

The one question, however, which counsel in their brief on petition for rehearing most strongly emphasize and urge, is one relating to “the proximate cause of the injury,” as disclosed by the evidence. They insist in their brief that the uncontradicted evidence shows “that the signal was given to the motorman to stop the car; that the plaintiff arose to her feet before the car had stopped, for the purpose of alighting, and that a passenger on the car—a stranger to the company—gave the signal to go ahead; that thereupon, in obedience to the signal, the motorman applied the power, and that the starting of the car caused the plaintiff to fall, from which fall she received the injury complained of.” Counsel then add: “It seems to us that the giving of the signal to go ahead was the proximate cause of the car’s starting. * * * No reference whatever is made in the opinion to the fact that a stranger gave the signal to proceed. The whole gist of the case, so far as the evidence is concerned, is wrapped up in this one subject.”

We cannot agree with counsel in their conclusion that, under the evidence, the whole gist of the case is, that a stranger to the company, a passenger on its car, gave the signal to go ahead. In considering the evidence we must not lose sight of the negligence charged in the complaint as the proximate cause of appellee’s injury. We quote from the first paragraph of the complaint: “That said motorman, without giving any notice or warning, then and there carelessly and negligently so applied power to said car as

to cause it to move forward with a sudden jerk, by means of which jerk, and on account of said negligence of said motorman, this plaintiff was thrown from said car.”

The negligent act here charged as being the proximate cause of the injury, is that the motorman so carelessly and negligently applied the power as to cause the car to move forward with a sudden jerk. It is not only the moving forward of the car or increase of the speed that enters into and characterizes the negligence charged, but the time, manner and circumstances of the moving of the car all enter into and give character and quality to this act in determining whether it constituted negligence. So that the reason for the motorman's increasing the speed of the car is but one element entering into the question of the negligence charged, and is not the whole gist of the case, as appellant's counsel contend.

We know that as a general rule a common carrier of passengers is only liable for the negligent acts of itself and servants. It is not liable for the acts of strangers. But under the evidence in this case this rule is not necessarily controlling. The evidence on the question of signals, who gave them, when and where they were given, and how many were given, is conflicting. The conductor and other witnesses testified that the intersection of Lake and Center streets, just after the car passed the curve, where it was claimed the signals were given and the speed of the car was being decreased, was regarded as a regular stopping place. There were a number of passengers on the car, among them appellee, who desired to get off at this point. The conductor testified, in substance, that after leaving Buffalo street he had been requested by a passenger to stop the car on Lake street, and that, pursuant to that request, midway between Buffalo and Lake streets, he gave the motorman the signal to stop the car at said Lake street; that he noticed when he got around the curve that the motorman was not going to stop, and that he (the conductor) was about to give him another signal to stop, but saw a passenger—Jack Shoup—

get up and pull the bell once, which was the signal to stop, and that he did not again give the signal himself, as he thought the one given by Shoup would be sufficient; that the speed of the car was slackened, and he thought it was going to stop, when he saw another passenger—Mr. Gray—give the bell two rings, which was the “go-ahead” signal; that the car then increased its speed, and about this time plaintiff was thrown off; that he (the conductor) gave the bell three rings, which he says was the emergency signal, and meant “Stop the car at once.”

Witness Gray testified that after the car turned south on Lake street, and when it reached the usual stopping place, he said to the conductor: “Aren’t you going to stop?” and that the conductor then rang the bell, which signaled the motorman to stop, and that the car then began to decrease in speed, but not enough to suit Gray, and he said to the conductor: “Why don’t you stop?” and he (Gray) then “jumped to pull the rope, and pulled it three or four times, * * * hard and fast.”

The witness Shoup testified to giving the stop signal. Other witnesses testified to hearing some of these signals, but we have quoted enough of the evidence to indicate that it was conflicting, and showed a conflict and confusion of signals, and an effort on the part of the conductor, and passengers as well, to stop in the first instance.

There was evidence also showing that the partition in the front of the car, between the passengers and the motorman, was made of glass, except about three feet of the lower part; that the motorman by looking back could see the passengers in the car; that when the speed of the car decreased, appellee got up, preparatory to alighting; that the car then increased its speed, started suddenly with a jerk, and threw appellee off.

It seems to us that this statement of the evidence is sufficient to show clearly that the question of negligence in

this case did not depend wholly on the question whether the signal to start the car, after its speed had been decreased, was given by a stranger, and that even if it did the question was one of fact to be determined by the jury, and not one of law to be determined by the court. The conductor admits that he gave one of the signals to stop the car, and witness Gray testified that the conductor gave the stop signal immediately before the car's speed slackened. The car's speed did slacken to make the stop, and the jury, under the evidence, had a right to infer that the "go-ahead" signal was never given by any one after the speed of the car slackened, because the conductor says that the passenger Gray gave the "go-ahead" signal of two bells, while Gray says that he gave the bell three or four hard, fast jerks, which signal, if it meant anything, meant an emergency stop.

The jury had a right to infer, also, that the motorman's action in decreasing the speed of the car was such as to have charged him with knowledge that passengers on the car might, on account of this act, have placed themselves in a position to be injured by any sudden movement of the car. The evidence warranted the further inference by the jury that there was such a conflict or confusion of signals given that the motorman should have known that there was something wrong, and that the high degree of care, caution and prudence which the law imposes upon those operating such cars—in the matter of looking after the safety of passengers—required that the motorman, before applying the power so as suddenly to move his car, should look to see the situation of the passengers in the car.

The car was open in front, so that the motorman could see the passengers in the car, their position and situation, by looking; and while it is true, generally speaking, that

6. his duties require that his attention be directed to the front and sides of his car, yet circumstances and conditions may arise that would require him to look also at the situation in the rear. *Bessenger v. Metropolitan St.*

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R. Co. (1903), 79 App. Div. 32, 79 N. Y. Supp. 1017; *Gregorio v. New York City R. Co.* (1906), 97 N. Y. Supp. 273, 49 Misc. Rep. 249.

The real question, under the issues tendered by the complaint, was, Did appellant, by and through its agents in charge of its car at the time plaintiff was injured, in
10. the operation of said car, exercise the high degree of care, caution and prudence that the law imposes in such cases, or did said agents carelessly and negligently apply the power, and cause the car to start with a jerk at a time when plaintiff was standing, preparatory to getting off the car, and thereby cause her injury, as charged in her complaint? In the determination of this question the jury was not bound to consider only, and be controlled entirely by, the one question of whether a stranger gave the motor-man the signal to go ahead; but such question was to be determined from all the facts and circumstances of the case developed by the proof, and, under the proof before indicated, the law does not permit us to disturb the conclusion reached by the jury.

It is only necessary that "the evidence affirmatively establish circumstances from which the inference fairly
11. arises that the accident resulted from the want of some precaution which the defendant ought to have taken." *Wabash, etc., R. Co. v. Locke* (1887), 112 Ind. 404, 421, 2 Am. St. 193. See, also, *Louisville, etc., R. Co. v. Schmidt* (1893), 134 Ind. 16.

The case at bar is entirely different from the case of *Claypool v. Wigmore* (1904), 34 Ind. App. 35, relied on by counsel. That is a case where a separate, intervening,
10. responsible agent cut off the line of causation from the original negligence, and this agency, together with the negligence of the injured party, was the sole, proximate cause of the injury. Neither is the case of *Sirk v. Marion St. R. Co.* (1895), 11 Ind. App. 680, relied on by counsel, directly in point. In that case there was a special verdict, and

the court in discussing it uses the following language: "So far as appears from the verdict, appellant in no other way informed the appellee of her desire to leave the car at Twenty-sixth street than by the signal given by herself to the motorman, in pursuance of which he slowed up and came to almost a stop, when she gave another signal, intended by her, indeed, as a stopping signal, but which may well have been the regular signal to start up the car. If it was, there was no negligence in the motorman's obeying it, unless he knew, or, by the exercise of due care, might have known that appellant was not yet off, but was in a position of danger should he start up the car. Nothing of this kind is found."

The language just quoted immediately precedes the language quoted by counsel in their brief for rehearing. There the special verdict failed to show that the motorman "knew, or by the exercise of due care might have known, that appellant was not yet off, but was in a position of danger should he start the car."

In the case at bar there was a general verdict, and every inference fairly deducible from the evidence is presumed in its favor. There was some evidence from

12. which the jury might have inferred the very facts before quoted, which the jury in the case of *Sirk v. Marion St. R. Co.*, *supra*, failed to find in the special verdict.

Counsel also contend that the court erred in refusing to give certain instructions tendered by appellant. These in-

structions refused, and argued by appellant in its
10. brief for rehearing, were based on the theory that if the signals given to the motorman to stop and to start the car were given by strangers, and the motorman acted upon them, and increased the speed of the car without knowing that appellee was standing and that appellee was thereby injured, there could be no recovery, thereby precluding the possibility of a recovery on account of the negligent manner of increasing the speed of the car

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with such suddenness as to throw a standing passenger from the car, and leaving out of account also the consideration by the jury of all other circumstances that might tend to prove negligence on the part of the conductor or motorman in connection with the starting of the car, or that might show a lack of that high degree of care, caution and prudence on their part which the law imposes in such cases. *Crump v. Davis* (1904), 33 Ind. App. 88; *Louisville, etc., R. Co. v. Snyder* (1889), 117 Ind. 435, 3 L. R. A. 434, 10 Am. St. 60; *Terre Haute, etc., R. Co. v. Sheeks* (1900), 155 Ind. 74.

For the reasons before expressed in discussing this same question in considering the evidence, and in view of the authorities heretofore cited, we think the court committed no error in refusing these instructions.

Counsel also object to instruction seven, given by the court at the request of appellant. This instruction states the law in accord with our views of this case, as before expressed.

Counsel next insist that in the original opinion the motion for judgment on the answers to interrogatories was treated as waived by appellant, when, in fact, it was not. It is only when the answers to special interrogatories are in irreconcilable conflict with the general verdict that they prevail against it. *Farmers Mut. Fire Ins. Co. v. Jackman* (1905), 35 Ind. App. 1; *Wabash R. Co. v. Keister* (1904), 163 Ind. 609; *City of Mishawaka v. Kirby* (1904), 32 Ind. App. 233.

We have examined the answers to interrogatories with care, and find no such irreconcilable conflict between them and the general verdict. We have tried to consider with care the questions presented by counsel in their petition for rehearing, and find no ground in the petition that warrants the granting of said petition.

Petition for rehearing overruled.

HARMON, RECEIVER, v. FORAN.

[No. 7,200. Filed May 18, 1911. Rehearing denied June 29, 1911.]

1. TRIAL.—*Verdict.*—*Interrogatories.*—*Conflict.*—Answers to the interrogatories to the jury control the general verdict only when they are in irreconcilable conflict therewith under any supposable evidence admissible within the issues. p. 266.
2. RAILROADS.—*Crossing Accidents.*—*Violating Ordinances.*—*Backing Engine without Light or Lookout.*—*Interrogatories.*—Answers to interrogatories to the jury that the plaintiff looked and listened for an approaching train before going upon the defendant's railroad track on a street crossing, that he neither saw nor heard any, that he was prevented therefrom by the noise of another train, and the dark and rainy night, and that because of an embankment and curve he could not see the approaching engine before he reached the point where he was struck, are not in conflict with a general verdict for the plaintiff. p. 266.
3. RAILROADS.—*Crossing Accidents.*—*Instructions.*—In an action by a pedestrian against a railroad company for damages sustained at a street crossing, an instruction that the plaintiff, to recover, must establish by a preponderance of the evidence (1) that he received the injuries as alleged in the complaint, and (2) that such injuries were the immediate and proximate result of defendant's carelessness and negligence, as alleged in the complaint, and that if the plaintiff so failed to establish either, he could not recover, is correct, and where followed by an instruction as to the effect of contributory negligence, is not prejudicial. p. 267.
4. TRIAL.—*Instructions.*—*How Considered.*—Instructions should be considered as a whole; and if they fairly present the law of the case they will not be held prejudicial. p. 268.
5. RAILROADS.—*Crossing Accidents.*—*Ordinances.*—*Instructions.*—In an action for damages sustained at a street crossing because of defendant railroad company's violation of a city ordinance, an instruction that the plaintiff, in the absence of knowledge to the contrary, had a right to assume that defendant would obey the city ordinance in reference to the moving of its trains, is correct. p. 268.
6. RAILROADS.—*Crossing Accidents.*—*Ordinances.*—*Lookout on "Rear End of Locomotive."*—*Instructions.*—In an action against a railroad company for injuries at a street crossing caused by defendant railroad company's running backwards a locomotive and tender without a lookout on the rear of the tender, in violation of a city ordinance requiring all companies so operating trains to provide a watchman on the "rear end of such locomotive, car,

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or train of cars," an instruction that it was the defendant's duty when it ran an engine and tender backwards to station a watchman on the rear of the tender, is not objectionable. p. 268.

7. RAILROADS.—*Crossing Accidents.—Contributory Negligence.—Presumptions.*—In an action for damages sustained at a street crossing, because of defendant railroad company's violation of a city ordinance, an instruction that the presumption is that when a person approaches a railroad crossing along a street or highway, and is injured in attempting to cross, he is not guilty of contributory negligence, is incorrect, there being no presumption in such case. *Nichols v. Baltimore, etc., R. Co.*, 33 Ind. App. 229. *Pittsburgh, etc., R. Co. v. Reed*, 36 Ind. App. 67, *Cleveland, etc., R. Co. v. Schneider*, 40 Ind. App. 38, and *Wamsley v. Cleveland, etc., R. Co.*, 41 Ind. App. 147, partly overruled. pp. 269, 270.
8. NEGLIGENCE.—*Contributory.—Burden of Proof.*—Contributory negligence constitutes a defense; and the burden is on defendant to prove such defense by a preponderance of the evidence. p. 269.
9. RAILROADS.—*Crossing Accidents.—Contributory Negligence.—Instructions.—Curing by Interrogatories.*—In an action for injuries sustained by a traveler at a street crossing, answers to the interrogatories to the jury that the plaintiff was not guilty of contributory negligence do not cure an erroneous instruction that the plaintiff is presumed to be free from contributory negligence, such answers probably being influenced by such erroneous instruction. pp. 270, 271.

From Superior Court of Marion County (73,384); *Pliny W. Bartholomew*, Judge.

Action by John Foran against Judson Harmon, as receiver of the Cincinnati, Hamilton and Dayton Railroad Company. From a judgment for plaintiff, defendant appeals. *Reversed.*

John B. Elam, J. W. Fesler and Harvey J. Elam, for appellant.

Thomas D. McGee, John W. Holtzman and Lewis A. Coleman, for appellee.

IBACH, J.—Action for damages against Judson Harmon, as receiver of the Cincinnati, Hamilton and Dayton Railroad Company, for personal injuries received by John Foran at a street crossing.

The case was tried on a single paragraph of complaint, in which it was alleged that appellant, in violation of various ordinances of the city of Indianapolis, was negligently backing an engine at night, without a light, without a man on the footboard, without ringing the bell, and at excessive speed, whereby appellee was caught at a crossing and injured. A demurrer to this paragraph, for want of facts, was overruled, and the issues formed by filing an answer in general denial. The trial was by jury, a general verdict against appellant for \$3,500 was returned, and interrogatories propounded by both appellant and appellee were answered. Judgment was rendered on the verdict.

Errors relied on for reversal are (1) overruling appellant's motion for judgment on answers to the interrogatories notwithstanding the general verdict, and (2) overruling appellant's motion for a new trial.

There are two main propositions to be considered: Whether the answers to interrogatories show that appellee was guilty of contributory negligence, and whether the court erred in giving to the jury certain instructions.

Eliminating certain interrogatories that call for conclusions, the jury found, by answers to other interrogatories, the following facts: Appellee was walking north on the west sidewalk of West street. On each side of the street was a high wall, and an embankment was filled in back of the west wall, extending westward. These walls and the embankment were a part of the track elevation work, then in course of construction. The track on which appellee was standing when struck was the first track north of the walls, and ran east and west, and its south rail was seven feet from the perpendicular north end of the wall. North of this track were other tracks. The track on which appellee was standing when struck curved to the south, west of West street. At the south end of the walls, before proceeding between them, appellee looked in each direction for trains on the tracks north of the walls. When he came to the north end

of the west wall there was a train, that was making considerable noise, passing on one of the tracks just north of the first track. Before he attempted to cross the tracks north of the walls, he looked and listened for trains and engines. In attempting to cross the first track he was struck by an engine moving backwards toward the east at a speed of from five to seven miles an hour, with bell ringing, and with a light burning on both front and rear. There were three men in the cab of the engine, but none on the rear end of the tender. The noise of the other engine that had passed prevented appellee from hearing the engine that struck him. The embankment and curve of the track to the south prevented him from seeing the engine. He looked to the west along the track after passing the wall, and before he reached the place where he was struck. From the point where appellee was struck, an engine could not be seen two hundred feet away, if it was approaching from the west. Appellee could not have seen the engine by looking toward the west at any time before he was struck. The night was dark and rainy. Appellee was familiar with the crossing, having passed it many times for three or four months. After passing the walls he walked in a northeasterly direction to near the center of West street, and during this time was giving his attention to the engine that was passing on the track north of the first track. He listened when near the south rail of the first track, and as he placed his foot upon the rail he turned to the west, and was struck by the end of the tender. The speed of the engine did not influence his movements, but he did not approach the track without regard to the engine. He did not know the engine was approaching until it struck him. There was no evidence showing how far the engine was from the north end of the west wall, while plaintiff walked from that point to the point where he was struck, nor as to how fast he was walking when he was approaching the track, nor as to the condition of his eyesight or hearing.

In the case of *McCoy v. Kokomo R., etc., Co.* (1902), 158 Ind. 662, the Supreme Court said: "In passing on a motion for judgment notwithstanding the verdict, it

1. should be borne in mind that the verdict necessarily covers the whole issue, and that it solves every material fact against the party against whom it is rendered. To enable the latter successfully to interpose the special findings of the jury upon particular questions of fact, as a reason for judgment in his favor, he must, at least, have special findings that stand in such clear antagonism to the general verdict that the two cannot coëxist. * * * It is required that every reasonable intendment shall be indulged in favor of the general verdict, and that, on the other hand, the court shall strictly, and without favorable intendment, construe the answers to interrogatories against the moving party. * * * It is not permitted that the court, in ruling on a motion for judgment based on the answers to interrogatories, should regard the evidence that was introduced upon the trial. * * * The motion should be refused where the antagonism between the verdict and the answers to interrogatories is not such, on the face of the record, as to be beyond the possibility of being removed by any evidence legitimately admissible under the issues. * * * As the motion that was made was for judgment upon the answers notwithstanding the verdict, it was required, in order to justify the sustaining of the motion, that the answers, in and of themselves, should be sufficient, when strictly construed, to warrant, in view of the issues, a judgment in favor of the moving party."

In the light of this able and complete enunciation of the principles governing a motion for judgment on the answers to interrogatories, we shall consider the present case.

2. We find that the answers to the interrogatories sustain the verdict. They show that appellee looked and listened after passing the walls before crossing the track; that he was prevented from hearing the engine by the passing

of another train; that the night was dark and rainy; that on account of the embankment and curve he could not see the engine approaching before he reached the spot where he was struck. They do not, as appellant claims, show that appellee had stopped for some time on the track, but rather that he had just set foot on the track, and had turned to look to the west. There are no special findings in clear antagonism to the general verdict, and there is not irreconcilable conflict between the two. The motion for judgment on the answers to the interrogatories was rightfully overruled.

Appellant claims that instruction three is erroneous, because it does not include all the elements that need to be considered in determining whether plaintiff should
3. recover. This instruction is as follows: "To entitle the plaintiff to recover in this action upon his complaint he must establish two things by a preponderance of the evidence: (1) That he received injuries as alleged in the complaint; (2) that such injuries are the immediate and proximate result of defendant's carelessness and negligence, as charged in the complaint. If plaintiff has failed to establish either of said propositions by such preponderance, then he would not be entitled to recover in this action; but if by such preponderance of the evidence he has established said two propositions, then he would be entitled to recover."

This instruction is a correct statement of the law as to all it purports to set forth, namely, what the plaintiff must establish in order to recover. It omits reference to the defense of contributory negligence, but in subsequent instructions given by the court the jury was fully informed that contributory negligence of the plaintiff would defeat his right to recover, even though the defendant had been negligent, and that it should consider all the evidence in order to determine whether plaintiff's negligence contributed to his injury.

In this State instructions are considered as a whole, and not separately. If the instructions taken as a whole correctly

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and fairly present the law to the jury, the giving of an

4. instruction which, if taken alone, might be construed in a sense in which it would not be understood when taken in connection with the others, will not be held reversible error, unless it has been shown that the jury were influenced thereby. We cannot hold that the giving of instruction three was reversible error. *Craig v. Frazer* (1891), 127 Ind. 286; *Atkinson v. Dailey* (1886), 107 Ind. 117; *Musser v. State* (1901), 157 Ind. 423; *Shields v. State* (1897), 149 Ind. 395; *Rains v. State* (1899), 152 Ind. 69.

Appellant also objects to instruction nine, given at the request of plaintiff, which states that in the absence of any knowledge or warning to the contrary, plaintiff had

5. a right to assume that defendant would obey the city ordinance in reference to the moving of trains in the city of Indianapolis. Such an instruction was held good in the case of *Pittsburgh, etc., R. Co. v. McNeil* (1904), 34 Ind. App. 310, and for the reasons there given, and upon the authorities there cited, we hold the present instruction good.

It is also claimed that the trial court committed error in giving several instructions which construe city ordinance No.

2,301, requiring a railroad company that runs back-

6. wards a locomotive, car or train of cars in the city of Indianapolis to provide a watchman on the "rear end of such locomotive, car, or train of cars," as meaning that the watchman should be stationed on the rear of the tender. In the present case there were three men on the locomotive, but none on the rear of the tender. We think the trial court made no error in this respect. A tender is ordinarily considered as a portion of the locomotive to which it is attached. Any reasonable construction of the ordinance would require a watchman to be stationed on the rear of the moving object, and to comply with its provisions a watchman must be stationed on the rear of the tender.

Appellant assigns as reversible error the giving of instruc-

tion seven requested by plaintiff, that “when a person approaches a railway crossing along a street or highway,

7. and in attempting to cross is injured, the presumption is that he was not guilty of contributory negligence.”

This instruction does not state correctly the rule of law existing in this State.

Since the enactment of the statute of 1899 (Acts 1899 p. 58, §362 Burns 1908) contributory negligence has been made a ground of defense in cases of this kind, and its ex-

8. istence must be shown by a preponderance of the evidence, in order to defeat a recovery in an action brought by a party who has been injured through the carelessness of another. By this act, however, the additional burden was not added to the defendant, of producing evidence to overcome a presumption that plaintiff was at the time of the injury free from contributory negligence.

In this jurisdiction there is no presumption in personal injury cases that the injured party used due care, or that he did not use due care; but where the defense of

7. contributory negligence is presented, it becomes necessary for the defendant, in order to defeat a recovery, to establish the fact that the injured party committed some act that proximately contributed to his injury, the same as any other issue of fact is proved, by a fair preponderance of the evidence, and by the act before referred to the legislature did not create a presumption of law in favor of the plaintiff as to any issue about which there is any controversy, but simply removed from the plaintiff the burden of showing, as a part of his own case, the fact that he was free from fault proximately contributing to his own injury. The court therefore erred in giving instruction seven. *City of Indianapolis v. Keeley* (1906), 167 Ind. 516; *Evansville, etc., R. Co. v. Berndt* (1909), 172 Ind. 697.

We cannot say that the jury was not influenced by this instruction in its consideration of the case, and that the

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answers returned to the interrogatories were not largely due to the effect which the instruction had upon the minds of the jurors, as the principal question to be determined in the case was whether the plaintiff was guilty of contributory negligence. If such instruction influenced the jury, and we conclude it did, the defendant was harmed and prejudiced thereby.

The error in giving instruction seven necessitates the granting of a new trial.

The judgment is accordingly reversed, with instructions to sustain appellant's motion for a new trial, and for further proceedings.

ON PETITION FOR REHEARING.

IBACH, J.—Appellee in his brief on petition for rehearing suggests that the original opinion makes no reference to the cases of *Nichols v. Baltimore, etc., R. Co.* (1904), 33 Ind. App. 229, *Pittsburgh, etc., R. Co. v. Reed* (1905), 36 Ind. App. 67, and *Cleveland, etc., R. Co. v. Schneider* (1907), 40 Ind. App. 38, upon the authority of which the instruction was given and upon which the case was reversed. These cases are in conflict with the Supreme Court decisions cited in the opinion. In the case of *Grand Trunk, etc., R. Co. v. Reynolds* (1911), 175 Ind. 161, the Supreme Court has expressly disapproved the cases of *Nichols v. Baltimore, etc., R. Co.*, *supra*, and *Pittsburgh, etc., R. Co. v. Reed*, *supra*, and held them erroneous on the proposition involved in instruction seven in the present case, setting forth fully the reasons for their holding. In *Cleveland, etc., R. Co. v. Schneider*, *supra*, the objection made to the instruction in the present case seems not to have been involved, but the opinion in that case, and the opinion in the case of *Wamsley v. Cleveland, etc., R. Co.* (1908), 41 Ind. App. 147, so far as they are, or may be construed to be, in conflict with the opinion in the present case, are overruled.

We adhere to our opinion that the giving of the erroneous

instruction seven was not made harmless to appellant by the answers to interrogatories, for the reasons stated in 9. the original opinion. The jury found the answers to interrogatories after the instruction complained of was given, and may have been led to answer them as it did, because influenced by the presumption that appellee was not guilty of contributory negligence, which would include the presumption that he looked and listened at proper times and places, although from the evidence, unaided by presumption, different answers might have been returned.

Appellee has furnished us with a brief on petition for rehearing showing much care, and we have for the second time gone into the case very thoroughly, but find no cause to modify our former judgment.

REPUBLIC IRON AND STEEL COMPANY v. LULU.

[No. 6,683. Filed November 16, 1910. Rehearing denied June 29, 1911.]

1. **MASTER AND SERVANT.—*Removing Slag.—Explosions.—Failure to Warn.—Proximate Cause.—Complaint.***—A complaint alleging that defendant operated a foundry, that the plaintiff was employed to remove slag, that he knew nothing of the dangers of an explosion thereof by the contact of water therewith, that defendant knew thereof but failed to warn him, that defendant negligently left pools of water near such slag, and that the plaintiff, while performing his work, stepped therein, splashing water upon the slag and causing an explosion, to his injury, sufficiently shows defendant was negligent, that its negligence was the proximate cause of the injury, and that the accident was one that the defendant should have anticipated. pp. 275, 278.
2. **MASTER AND SERVANT.—*Latent Dangers.—Duty to Warn.***—It is the master's duty to warn servants of the latent dangers of their service. pp. 276, 277.
3. **NEGLIGENCE.—*Proximate Cause.***—The proximate cause of an injury is the decisive cause; and it may consist in omission as well as commission. p. 277.
4. **PLEADING.—*Complaint.—Construction.***—A complaint should be liberally construed with a view of giving substantial justice to the parties. p. 277.

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5. TRIAL.—*Interrogatories.—Contradictory Answers.*—Conflicting answers to interrogatories to the jury nullify one another. p. 279.
6. APPEAL.—*Instructions.—Bills of Exceptions.*—Instructions may be brought into the record by a special bill of exceptions. p. 279.
7. MASTER AND SERVANT.—*Latent Dangers.—Failure to Warn.—Instructions.*—An instruction that it is the duty of a master to warn his servant who is ignorant of a danger, known to the master, is not misleading on the ground that it required the master to warn the servant against obvious dangers, where the complaint and the evidence showed that the servant was injured by splashing water upon hot slag, thereby causing an explosion. p. 279.
8. MASTER AND SERVANT.—*Latent Dangers.—Duty to Warn.—Instructions.*—In an action by a servant against defendant iron company for negligence in failing to warn him of the dangers of the contact of water with hot slag, an instruction that the duty of the master to instruct an ignorant servant of latent dangers is commensurate with the danger to be apprehended, is not prejudicial. p. 280.
9. MASTER AND SERVANT.—*Latent Dangers.—Implied Notice.—Instructions.—“Must.”—“May.”*—In an action by a servant against defendant iron company for failing to inform him of the latent danger of the contact of water with hot slag, the refusal of an instruction, that if the jury should find that the plaintiff worked in close proximity to such slag prior to his injury and that it was common knowledge among the employes that the contact of water with hot slag would cause an explosion, the jury must consider such evidence on the question of such servant's notice of such danger, is not erroneous, since said instruction confines the jury to the bare facts stated therein. Roby, J., concurs. p. 280.
10. TRIAL.—*Instructions.—Duplication.*—It is not erroneous to refuse to duplicate instructions. p. 282.

From Lake Superior Court; *Harry B. Tuthill*, Judge.

Action by Stani Lulu against the Republic Iron and Steel Company. From a judgment on a verdict for the plaintiff for \$3,000, defendant appeals. *Affirmed.*

Crumpacker & Moran, Richard Jones, Jr., and Fred Crumpacker, for appellant.

F. N. Gavit, J. W. McAleer and J. E. Westfall, for appellee.

RABB, J.—Appellant is engaged in the manufacture of iron and steel products, and for this purpose maintains a large rolling-mill and iron furnace. In the process of manufacturing these products, the raw material is melted in the furnaces to a liquid form, and foreign substances, which are known as slag, are separated from the pure iron, and while in a molten state are drawn from the furnace into a pot, known as a cinder pot.

Appellant's cinder pot was sunk in the ground until the top of the pot was on a level with the surface of the ground, and was located outside the walls of appellant's building enclosing its furnace, so that it was exposed to the weather.

The slag, after it is cool enough to handle, is removed from the cinder pot to the dump pile, and, for convenience in handling it, while it is still in a liquid state an iron link is suspended in the molten mass, from a bar placed across the top of the pot. Around this link the slag gathers and hardens as it cools. It appears that while the slag is in a molten state its contact with water is harmless, but there is a certain stage in the process of its cooling when contact with water will cause a dangerous explosion.

Appellee was engaged in appellant's service in charge of the cinder pot, and while engaged in the duties of his service was severely injured by the explosion of the slag, caused by his stepping into a pool of water near the cinder pot, which had gathered there from a recent rain, and which caused the water to splash into the cinder pot onto the hot slag.

This action was brought by appellee to recover damages for the injuries thus sustained. He claims that said injuries resulted from negligence on the part of appellant in failing to warn him of the danger. The case was put at issue and a trial had, resulting in a verdict in favor of appellee.

In this court the sufficiency of the complaint is assailed, as is also the ruling of the court below on appellant's motion

for judgment in its favor on the answers returned by the jury to interrogatories submitted to it, and on its motion for a new trial.

The complaint set forth facts showing the nature of appellant's business and of appellee's employment, the nature of the material appellee was required to work with, in reference to its explosive character, and showing that the iron vessel, in which the slag was run from the furnace, was located as heretofore stated, and that it was sunk in the earth until its top was on a level with the surface of the ground.

It was further alleged that the ground around the vessel was packed and hardened, and of an uneven surface, so that when it rained water would stand in pools in such uneven places for a day at a time, after the rain was over. All such conditions, it is charged, were known to appellant. The complaint narrates the circumstances attending the accident that resulted in appellee's injury, and expressly alleges that appellee was ignorant of the fact that the slag was liable to explode on coming in contact with water, and alleges, also, that appellant knew of this quality in the slag and of the danger arising therefrom, and negligently set appellee to do the work in which he was engaged, knowing him to be ignorant of the explosive character of the slag on its coming in contact with water, without informing him of such explosive character, or warning him of the danger, and that appellee stepped into the water, by reason of the negligence of appellant in so failing to instruct or warn him, and "that his injuries were caused by the negligence before alleged."

It is insisted that the complaint is insufficient to withstand a demurrer (1) because it fails to show that the injury complained of did not result from an assumed risk of the employment; (2) because it fails to show that the injury was proximately caused by the negligence averred; (3) because it affirmatively appears that the injury was the result of an accident, not reasonably to have been anticipated as a re-

sult of the negligence charged, and therefore created no liability against appellant.

In support of its first contention, appellant maintains that the danger of injury from the explosive character of the slag was an ordinary risk of appellee's employment,

1. which he assumed when he accepted the employment.

It is argued that a liability to explode was inherent in the thing appellee's employment required him to work with and around, and we are cited to the case of *Myers v. W. C. DePauw Co.* (1894), 138 Ind. 590, as decisive authority for this contention.

The case cited involved an injury to an employe in a plate glass factory, whose duties required him to handle plate glass, and whose hand was cut by the breaking of glass. It was there held that the master was under no duty to inform the servant, who entered its service, of the danger arising from the liability of the glass to break. The court, in deciding the case, said: "It is a matter of common observation that glass is a fragile substance, and that its broken edges are sharp and dangerous. It is necessarily one of the natural incidents of the handling of glass, in the processes of its manufacture, that it will be broken without violence from, or the fault of, those who so handle it." It is for this reason that the court held in that case that no duty to instruct or warn the employe rested on the master. The servant could, by looking at the glass, see the danger. It was a matter of common knowledge. Such, however, is not the character of the substance with which appellee in this case was required to deal. The court cannot say that the slag or cinders were inherently explosive, nor is it a matter of common knowledge that hot slag will explode, or that it will explode when brought in contact with water, and it could not be told by looking at the substance that it possessed this quality. In fact, it appears that it is not explosive when brought into contact with water, except under certain conditions; but when these conditions exist—that is, when it has sufficiently

cooled so as to become hardened on the surface—then if it comes in contact with water a dangerous explosion is inevitable. If this peculiar quality of the slag is known, danger to those who handle it, arising from this cause, can easily be avoided. In fact, if proper care is used, the danger may be eliminated, but if it is not known, and conditions are such that water may be brought in contact with the slag when it is in that peculiar state that contact will cause an explosion, danger is ever present while the conditions exist, and is present only because of the ignorance of those whose movements around the water and the hot slag when they are in such proximity may bring the hot slag and water in contact with each other. The position of the man who is ignorant of the explosive character of the slag, and who works around it under such conditions, is somewhat similar to that of a soldier, who, charging an enemy's fort, treads over ground underlaid with torpedoes, or a ship sailing over a harbor that has been mined.

The averments of the complaint are that appellant set appellee to work with this slag pot, with the hot slag in it; that in the course of appellee's work with and around it, the slag necessarily came into that state when it would explode if brought in contact with water; that the top of the pot was level with the surface of the ground, and the ground around it was filled with pools of water; that appellee was ignorant of the danger resulting from the contact of the water and the slag; that appellant knew the conditions, knew the explosive quality of the slag, and knew that appellee was ignorant that it possessed this quality.

The law requires of the master, at the inception of the relation, or when the work is assigned to an inexperienced servant, that he inform such servant not only of ex-

2. traordinary dangers, but of the ordinary dangers that are likely to arise in the work, and which the servant cannot see and understand without such information. 2 Bailey, Per. Inj. §2665; Buswell, Per. Inj. §202; Wharton,

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Negligence, §208; Wood, Master and Serv. (2d ed.) §349; 1 Labatt, Master and Serv. §240, and cases cited; *St. Louis, etc., R. Co. v. Valirius* (1877), 56 Ind. 511; *Salem Stone, etc., Co. v. Griffin* (1894), 139 Ind. 141; *Smith v. Peninsular Car Works* (1886), 60 Mich. 501, 27 N. W. 662, 1 Am. St. 542; *Parkhurst v. Johnson* (1883), 50 Mich. 70, 15 N. W. 107, 45 Am. St. 28.

The conditions shown by the facts averred in the complaint clearly imposed the duty upon the master to put his ignorant servant upon the same footing with himself

3. with reference to knowledge of the danger; to arm him with the knowledge necessary to enable him to protect himself from the danger. Do the facts averred show the injury complained of was the proximate cause of the negligence charged? The proximate cause of a given result may not be the immediate cause. Proximate cause, within the meaning of the expression when used in a legal sense, is the efficient cause; the cause that starts the train of circumstances that leads to the injury. In legal contemplation, that may be a cause of a particular occurrence which fails to prevent it, as well as acts and circumstances that actively work to produce it.

It was the duty of the master to inform the servant of those qualities in the material with which he was required to work, that it was necessary he should know in order to pro-

2. tect himself from danger while engaged in the work.

It was his duty to prevent the explosion of the slag, by imparting his knowledge of its character to the servant.

It is averred that appellee stepped into said water, by reason of the negligence of appellant in so failing to instruct or warn him. This averment must be construed

4. in connection with all the other averments of the complaint, which must be liberally construed with a view to substantial justice between the parties. §385 Burns 1908, §376 R. S. 1881.

What was meant by this averment? How must it have

been understood by appellant? The negligence charged against appellant is that it failed to inform appellee 1. of the explosive nature of the slag. The words "instruct" and "inform" convey the same meaning to the mind in the connection in which they are used in the pleading, and treating them as synonymous, we think that the complaint fairly charges that because appellee did not know that the hot slag was liable to explode if brought in contact with water, he stepped into the pool of water, and caused it to splash into the cinder pot. We think it sufficiently appears that the negligence charged was the proximate cause of the injury, and that it was not essential that the complaint should aver that if appellant had warned appellee of the explosive character of the slag, he would not have stepped into the water. When it is said that appellee stepped into the water because he lacked this information, the force of the statement is not added to by the further averment that he would not have done it had he possessed the information which appellant's negligence withheld from him. He stepped into the water because he did not know the danger, and it was his stepping into the water that set in motion the causes that produced the injury, and was therefore the proximate cause of the injury complained of, and the averments of the complaint, we think, clearly show that appellant's negligence was responsible for this act, in that it failed to prevent it. In other words, if appellant had performed its duty, this act, which set in motion the causes producing the injury, would not have been done. *Chicago, etc., R. Co. v. Dinius* (1908), 170 Ind. 222, and cases cited.

Was the injury such as appellant might reasonably anticipate would occur? We think this question is fully met and answered by what has already been said in reference to the conditions which it is shown surrounded the cinder pot. Here was the hot slag in the cinder pot, passing from a molten liquid state into a hardened mass, in which it necessarily came into the state that made it dangerously explosive. Here

were pools of water in the immediate vicinity. It was almost inevitable that those who worked about said cinder pot, in ignorance of its character, would cause the water to splash on it. We think that the facts set forth in the complaint not only show that the accident might reasonably have been anticipated, but they show such a state of facts as rendered it almost inevitable that it would happen.

No error intervened in overruling appellant's demurrer to the complaint. The effect of the answers to the interrogatories, so far as they can be said in any manner

5. to conflict with the general verdict, is destroyed by contradiction, and the court committed no error in overruling appellant's motion for judgment in its favor upon them.

The reasons assigned for a new trial, that are brought in review in this appeal, call in question, among other things, certain instructions given by the court to the jury, and certain instructions asked by appellant that were refused.

Appellee insists that no question is presented by the record on the instructions given and refused, for the reason that the instructions are not brought into the record in
6. accordance with the provisions of §561 Burns 1908, Acts 1907 p. 652. The instructions given and refused appear in the record by a special bill of exceptions, and are, therefore, properly before us. *Pittsburgh, etc., R. Co. v. Reed* (1905), 36 Ind. App. 67.

Complaint is made of certain instructions given by the court on its own motion. It insisted that instruction six, which imposes upon the master the duty to warn a

7. servant known to be ignorant of a danger known to the master is erroneous, because it would impose on the master the duty to warn of an obvious danger. The uncontradicted evidence in this case disposes of this objection. The danger arising from the contact of water with the hot slag, as it is described in the complaint and shown in the evidence, was not an obvious danger; it arose out of the

nature of the materials the employe was required to deal with, and from causes that he would not necessarily understand.

Instructions nine and thirteen are criticised because of the use of the phrase “may consider” instead of “must consider.” No error can be predicated on the giving of these instructions. The questions sought to be raised by appellant are properly presented upon the refusal of the court to give the instructions in the imperative form, and are discussed under that head.

The objection to instruction ten, given by the court to the jury, presents the same questions that arise upon objections to instruction six, and for the same reason is not well taken.

Instruction eleven, given by the court, which is criticised by appellant as being outside of the issues, simply informs the jury that the duty of the master to warn and instruct an ignorant servant of hidden dangers is commensurate with the danger to be apprehended. We see no fault in this instruction. There was evidence from which the jury might have found that appellee was entirely ignorant of the nature of the hot slag, and the danger of the contact of water therewith.

Appellant, at the proper time, requested the court to instruct the jury as follows: “If you find from the evidence in the case that plaintiff worked for a considerable number of years in the mill of defendant, and during that time explosions of cinders frequently occurred, and that in said mill during all said time it was a matter of common knowledge and general repute that hot cinders would explode when brought in contact with water, or anything that was moist and contained water, after the manner alleged in the complaint, and if you further find that during said period of employment plaintiff was brought in close proximity with the busheling furnace, and the taps which contained the slag, the explosion of which is alleged to have

caused his injuries, then I instruct you that such evidence * * * must be considered by you in determining whether plaintiff knew, or could have known by the exercise of reasonable care, of the danger which caused the injury."

The court refused to give this instruction in the exact form asked, but gave it after substituting the phrase "may consider" for "must consider," in determining the question of notice. Appellant complains of the refusal of the court to give this instruction as it was tendered, and this is one of the grounds on which a reversal is sought. It is earnestly contended by appellant that the court committed a reversible error in substituting the word "may" for the word "must" in said instruction.

Without deciding this question, we think that no error can be predicated on the refusal of the court to give the instruction. Before complaint can be made of the refusal of the court to give an instruction tendered, the instruction must be such as the party is entitled to have given to the jury. Can it be said, as a matter of law, that the bare facts stated in this instruction, assuming them to be true, regardless of what other facts or circumstances appeared in the evidence, as the jury should view it, absolutely required that the jury should give these facts consideration in determining the question of notice to appellee of the danger? Suppose the jury should conclude that although these explosions did occur, as set forth in the instruction, and that it was a fact, as set forth therein, that appellee was working for appellant at the time the explosions occurred, and that his work frequently brought him in close proximity to the busheling furnace and taps containing the cinders, yet that such explosions occurred at such times and under such circumstances that appellee did not and could not hear them, would it be contended that the jury should give any consideration whatever to the fact that such explosions did occur while appellee was in appellant's employ? Whether these facts were necessary and proper to be considered

in determining the question of notice would depend altogether on whether the explosions occurred under such circumstances that appellee heard them; and that fact was to be determined by the jury, not from the fact alone that the explosions occurred and that appellee worked in proximity to the busheling furnace and taps, but from all the evidence in the case. These recited facts were only proper to be considered by the jury in connection with the other evidence in the case, and to have rendered the instruction tendered impervious to objection, it should have so stated. The instruction tendered told the jury that the facts therein mentioned must be considered in determining the question of notice, regardless of whether the jury believed from all the evidence that the explosions were heard by the appellee, and we think no error intervened in refusing this instruction.

The refusal of the court to give other instructions asked by appellant is complained of. We have carefully examined such instructions, and conclude that they are substantially covered by instructions given by the court, and that therefore no error intervened in the refusal of the court to give them.

It is insisted, further, that the evidence is not sufficient to sustain the verdict. While the evidence was conflicting, we cannot concur in appellant's view.

Judgment affirmed.

CONCURRING OPINION.

ROBY, J.—It has many times been held that the use of the word "should" in such an instruction as the one herein considered was reversible error. *Woollen v. Whitacre* (1883), 91 Ind. 502, cases there cited.

It was subsequently held, most reasonably, indeed, that "when a judge tells the jury that it is proper for it to consider the interest, manner, etc., of the witnesses, as it is usually phrased, he is but ruling as he may rightly rule

that such evidence is competent; and, in searching for the fact established by the evidence, it is the duty of the jury to consider all competent evidence that may throw light upon the truth, and it is no less essential to a correct result, and quite as much the jury's duty to consider facts and circumstances properly before them, which go to discredit a witness or to strengthen his testimony as it is to consider the statements made by the witnesses. The cases of *Woollen v. Whitacre* [1883], 91 Ind. 502, *Unruh v. State, ex rel.* (1886), 105 Ind. 117, *Duvall v. Kenton* (1891), 127 Ind. 178, and perhaps some others, so far as they may seem to hold to a different rule, are no longer authorities upon the question here involved." *Fifer v. Ritter* (1902), 159 Ind. 8, 12.

Of course there is a difference between words permissive and words imperative, but where the instructions taken together show that "may" was understood as a direction to consider and weigh, there is no error in using it, and so of the misuse of the word "should," or its equivalent, while we all know that the understanding of the jury depends not upon the technical accuracy of language, so much as upon the accent, emphasis and tone of the judge who gives the instruction. The decision in the case of *Fifer v. Ritter, supra*, was the perfection of reason, and is expressive of the law.

The writer of the opinion in *Southern R. Co. v. State* (1905), 165 Ind. 613, apparently understood the holding that permitted the use of the word "should" to be a declaration that no other form of expression could properly be used. In this he was mistaken. The case is not therefore an authority upon the subject, being based, as the opinion shows, upon a misapprehension.

EAGLE v. NEW YORK LIFE INSURANCE COMPANY.

[No. 7,032. Filed May 13, 1910. Rehearing denied December 30, 1910. Transfer denied June 29, 1911.]

1. **INSURANCE.—*Loans on Policy.—Forfeitures.***—In an insurance policy upon which the assured and his beneficiary had borrowed money from the company, pledging the policy as a security therefor, a provision that “if any premium on said policy or any interest on said loan is not paid on the date when due, * * * such pledge shall, without demand or notice of any kind, * * * be foreclosed by said company, by deducting the amount due on said loan from the reserve on said policy,” is not invalid on the ground that the legal requirements for a foreclosure are not granted thereby. p. 293.
2. **INSURANCE.—*Lex Loci Contractus.—Loans.—Place of.—Husband and Wife.—Suretyship.***—An insurance policy issued by a New York company, and providing that the “contract contained in such policy and * * * application shall be construed according to the law of the State of New York, the place of said contract being agreed to be the home office of the company,” and providing further that “the amount loaned [on the policy] at any time shall be such as the insured may desire,” and that the “policy shall be duly assigned to the company as collateral security for the loan,” and a loan agreement executed by the insured and his wife who was the beneficiary in the policy, providing that such agreement was “made under and pursuant to the laws of the State of New York, the place of said contract being said home office of said company,” are governed by the laws of New York, and the wife’s rights as beneficiary, are subject to the rights and actions of the assured under the provisions of the policy. pp. 295, 297.
3. **INSURANCE.—*Married Women.—Rights of.—New York Statute.***—The New York statute providing that “a married woman may, in her own name, cause the life of her husband to be insured for a definite time,” and that when she survives such time she is entitled to receive the insurance money as her separate property “free from any claim of a creditor * * * of her husband,” and that “a policy of insurance on the life of any person for the benefit of a married woman is also assignable * * * and may be surrendered * * * by her * * * with the written consent of the assured,” applies to insurance taken by a wife upon the life of her husband, and not to a policy taken by the husband in which the wife is named as beneficiary; and the wife

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is authorized to assign, with her husband's written consent, a policy so taken by her. p. 296.

4. INSURANCE.—*Beneficiary.—Right to Change.—Effect.*—The beneficiary of an insurance policy does not have a vested right therein, where the assured is authorized to change beneficiaries. p. 296.
5. INSURANCE.—*Options.—Right to Exercise.*—The husband has the right to exercise the options provided in an insurance policy taken out by him, where his wife is named as beneficiary, and where he has the reserved right of changing beneficiaries at any time. p. 296.
6. INSURANCE. — *Contracts.—Suretyship.—Married Women.—Statutes.*—The Indiana statute (§7855 Burns 1908, §5119 R. S. 1881) declaring void all contracts of suretyship executed by married women, does not apply to a loan obtained by a husband and his wife on an insurance policy, where the provisions for the loan in question were contained in the policy in which such wife's rights were acquired. p. 297.
7. INSURANCE. — *Loans. — Forfeiture. — Waiver.—Prejudice.*—An agreement by an insurance company to be lenient with a borrower and not to enforce a forfeiture, the written contract for the loan providing for a forfeiture, though probably unenforceable, must be shown to have been violated to the beneficiary's prejudice, before the beneficiary can found a claim thereon. p. 298.
8. INSURANCE.—*Extended.—Conditions Precedent.—Failure to Perform.*—An action for extended insurance cannot be maintained, where the policy provided that the payment of any loan to the assured should be a condition precedent to the automatic extension of such insurance and where the assured had failed to pay his loan. p. 299.

From Marion Circuit Court (15,919); *Henry Clay Allen*, Judge.

Action by Mary W. Eagle against the New York Life Insurance Company. From a judgment for defendant, plaintiff appeals. *Affirmed.*

John H. Kingsbury and *Joseph Collier*, for appellant.

James H. McIntosh, Gavin, Gavin & Davis and *Arthur P. Will*, for appellee.

COMSTOCK, J.—This action was based on a contract of insurance executed by appellee on the life of Charles D. Eagle, husband of appellant. The policy was for \$1,500, and appellant was designated as beneficiary therein.

The complaint alleges that on July 13, 1897, defendant executed its contract of insurance, whereby, in consideration of an application made therefor and payment of premiums thereon, it promised to pay to plaintiff the sum of \$1,500, on proof of the death of Charles D. Eagle. Defendant further promised that in the event premiums were paid thereon for a period of nine years, and thereafter further payments of premiums were defaulted, and said Charles D. Eagle should die within a period of seven years and eleven months from the time of such default, it would pay to the beneficiary the sum of \$1,500. Copies of the contract of insurance, and of the application made therefor, are filed with the complaint.

Plaintiff further avers that the premiums were paid in advance on said contract of insurance in accordance with the stipulations therein, for a period of nine years from date of execution thereof to and including the year ending July 13, 1906; that the semiannual premium due and payable on July 13, 1906, was not paid on said day, nor was it paid within the thirty days' grace allowed by said policy; that on January 27, 1907, within said period of seven years and eleven months, said Charles D. Eagle died; that plaintiff has made full proof of insured's death, in the manner provided in said contract; that she and the insured performed all the stipulations in said contract on their part to be performed; that defendant, in violation of the terms of said contract, refused to pay said sum of \$1,500, and denied liability under said contract.

The main body of the policy reads:

“NEW YORK LIFE INSURANCE COMPANY

By this policy of insurance, agrees to pay \$1,500 to Mary W., wife of the insured, or, in the event of her prior death, to the insured's executors, administrators and assigns, or to such other beneficiary as may be designated by the insured, as hereinafter provided, at the home office of the company, in the city of New York,

immediately upon receipt and approval of proofs of the death of Charles D. Eagle, of Indianapolis, Marion county, Indiana. * * * And the company further agrees that this policy shall be incontestable after it has been in force one full year, if the premiums have been duly paid. This contract is made in consideration of the written application of the insured, which is a part of this contract, and in further consideration of the sum of \$15.96, to be paid in advance, and of the payment of a like sum on January 13 and July 13 in every year thereafter during the continuance of this policy. The special advantages, benefits and provisions, printed or written by the company on the following pages, are conditions precedent, and are a part of this contract, as fully as if they were recited at length over the signature hereto affixed.”

Under the title of “Special Advantages,” certain loan and surrender values, and provisions for extensions, are shown, as follows: Loan value at the end of the eighth year, \$99, at the end of the ninth year, \$117; the surrender value in paid-up insurance at the end of the ninth year, \$277, and the “extended insurance for \$1,500 for a term of seven years and eleven months for the ninth year.” For the purposes of this opinion it is needless to set out the table for other advantages, or the accumulation of guaranties, because they are not applicable to this policy.

Under the title “Benefits and Provisions,” said policy contains the following:

“Second. The amount loaned at any time shall be such as the insured may desire, not to exceed the sums shown in the table on the preceding page. The amount of any loan shall include any previous loan then unpaid. Third. That this policy shall be duly assigned to the company as collateral security for the loan, and deposited at the home office. A duplicate of the loan agreement, which is also a receipt for the policy, will be furnished to the insured.”

The application is set out, and it shows that the “name of the person applying for insurance is Charles D. Eagle.” In this application it is agreed, on behalf of himself, “or

any person who shall have or claim any interest in any policy issued under this application," as follows:

"Sixth. That the policy applied for shall be in the form now in use by the company, and that the contract contained in such policy and this application shall be construed according to the law of the State of New York, the place of said contract being agreed to be the home office of the company."

There was an offer to confess judgment for \$52, and costs accrued and accruing, including those on final judgment.

Appellee answered in two paragraphs. The first was a general denial. The second was a special and partial answer to all except \$49 of the principal, and the interest thereon from the time of the death of the insured. It admits the execution of the policy sued on, and avers that appellee is a corporation organized under the laws of the State of New York, with its general offices in the city of New York, in said state, and that it is a resident and citizen of said state; that said policy was executed in the city of New York; that one of its provisions was that

"the company will make advances to the insured, as such, under this policy within the month of grace allowed for payment of premiums, on application to the home office at the third or any subsequent anniversary of the insurance within the accumulation period under the terms of the company's loan agreement then in use, upon the conditions in said policy set forth;"

that insured paid the premiums up to and including the one maturing on January 13, 1906; that the premium maturing July 13, 1906, was wholly unpaid; that while the policy was in force, on July 20, 1905, appellee, pursuant to its terms, and at the request of said Charles D. Eagle and appellant, advanced to them \$99 in cash, as a loan upon said policy, and in consideration thereof they executed to appellee the following:

Whereas, the undersigned have this day duly received from the New York Life Insurance Company \$99 in cash, as a loan on policy No. 803,039, issued by said company on the life of Charles D. Eagle, therefore, in consideration of the premises, the undersigned hereby agree as follows: (1) To pay said company interest on said loan at the rate of five per cent per annum, payable in advance from this date to the next anniversary of said policy, and annually in advance on said anniversary and thereafter. (2) To pledge, and do hereby pledge, said policy as collateral security for the payment of said loan and interest, and herewith deposit said policy with said company at its home office. (3) To pay said company said sum when due, with interest, reserving, however, the right to reclaim said policy by repayment of said loan with interest at any time before due, said repayment to cancel this agreement without further action. (4) That said loan shall become due and payable, (a) either if any premium on said policy or any interest on said loan is not paid on the date when due, in which event said pledge shall, without demand or notice of any kind, every demand and notice being hereby waived, be foreclosed by said company, by deducting the amount due on said loan from the reserve on said policy, computed according to the American Experience Table of Mortality, and interest at the rate of four and one-half per cent per annum; and if after said deduction there is any balance of said reserve as so computed, said balance shall be taken as a single premium of life insurance at the published rates of said company at the time said policy was issued, and shall be applied to purchase upon the life of the insured under said policy, at the age of said insured on said due date, paid-up insurance for such amount as said balance will buy payable under the same conditions as the original policy, but without premium return, participation in profits, or further payment of premium. (b) Or (1) on the maturity of the policy as a death claim or an endowment; (2) on the surrender of the policy for a cash value; (3) on the completion of any tontine or accumulation dividend period. In any such event the amount due on said loan shall be deducted from the sum to be paid or allowed under said policy. (5) That the application for said loan was made to said company at

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its home office in the city of New York, was accepted, the money paid by it, and this agreement made and delivered there; that said principal and interest are payable at said home office, and that this contract is made under and pursuant to the laws of the State of New York, the place of said contract being said home office of said company. In witness whereof said parties have hereunto set their hands and affixed their seals this 20th day of July, 1905.

Charles D. Eagle (L. S.)

Mary W. Eagle (L. S.)

Signed and sealed in presence of Mary C. McComb.
Foreclosed and paid by deducting the amount of the debt from the value of the policy.

John C. McCall, Secretary.

Forwarded from Indianapolis branch office, 7-21-1905.

T. J. Logan, Cashier.

Premium paid in full.

to 7-13-5

B. N. \$———.”

Said answer further avers that no part of the loan has been repaid except by application of the policy as was thereafter shown. It avers that as collateral security for the repayment of the loan, said Charles D. Eagle and appellant pledged, transferred and assigned said policy to appellee; that on December 31, 1906, the premium maturing July 31, 1906, was unpaid, and the loan and interest were due and unpaid; that thereupon, in accordance with the terms of such loan agreement, defendant foreclosed said pledge of said policy, by deducting the amount due on said loan, without interest, which was the sum of \$99, from the reserve of said policy, computed according to the American Experience Table of Mortality, and interest at the rate of four and one-half per cent per annum, which was the sum of \$119.67; that this left a balance of \$20.67 of the reserve, not required for the repayment of the loan, and this balance the company applied, as a single premium, to the purchase of paid-up insurance at the published rates of said company at the time said policy was issued upon the life of said insured in said policy at the age of said insured on

said due date, said paid-up insurance being payable under the same condition as the original policy, but without premium return, participation in the profits or further payment of premiums, the amount of said paid-up insurance thus purchased being \$49; that upon receipt of the notice of death, appellee offered to pay appellant said sum of \$49, and is still ready and willing so to do.

A demurrer was filed to said second paragraph of answer, and overruled, and appellant replied in four paragraphs. The first was a general denial, which was subsequently withdrawn. The second alleged, in substance, that the policy of insurance was executed in the State of New York, and, by a statute of that state, became the absolute property of the wife. A copy of the statute is filed, with averments that the statute was duly enacted, and is in full force and effect; that said wife caused her husband to apply for the policy, and paid from her own funds the premiums thereon; that at the time said policy and loan agreements were executed, she was a married woman, the wife of said Charles D. Eagle; that the funds procured on said loan agreement were for the benefit of and were used by her husband for his own use, and that no part of the funds were used by her or for her benefit, but she was surety for her husband, and these facts appellee knew; that at the time said loan agreement was executed, appellant was, and for years prior thereto had been, a *bona fide* resident of Indiana, and the loan agreement was signed by her in said State, and it was by her husband delivered to appellee at Indianapolis, in said State, and the funds were paid by appellee to appellant's husband at said point; that the recitals in said loan agreement, to the effect that said agreement was signed and delivered in the State of New York, and the money paid thereon at said point, are all false, and were inserted by appellee for the fraudulent purpose of defeating the statute of suretyship of Indiana, and that said loan agreement was void because of suretyship of appellant; that the statute

of New York, so far as material to this case, reads as follows: "A married woman may, in her own name, cause the life of her husband to be insured for a definite period, or for term of his life. When a married woman survives such period, or term, she is entitled to receive the insurance money, payable by the terms of the policy, as her separate property, and free from any claim of a creditor or representative of her husband. * * * A policy of insurance on the life of any person for the benefit of a married woman is also assignable, and may be surrendered to the company issuing the same, by her, or her legal representative, with the written consent of the assured."

The third paragraph alleges that at and before the time the loan became due, appellant and her husband were in financial embarrassment, and did not have funds with which to pay said loan; that they applied to appellee for additional time in which to make said payment; that appellee informed them that it would not insist on a strict performance of the loan agreement, that it would not insist on strict, prompt and punctual payments of premiums and interest, and that it would be lenient with and allow appellant and her husband a reasonable time in which to make said payments; that appellant and her husband relied on said representations of appellee, and by reason of said conduct on its part they were led to believe that appellee did not intend to insist on prompt and punctual payment; that for that reason they did not negotiate a loan elsewhere, or attempt to raise funds with which to pay said debt; that they acted on the belief that appellee would not withdraw said leniency, and would not declare a forfeiture, except on demand for payment and notice of withdrawal of said grace; that appellee thereafter, in violation of the extension, and without demand for payment, or notice to appellant or her husband of its withdrawal of extension, or its intention to forfeit and foreclose the pledge, did forfeit and foreclose the pledge; that

no notice of said foreclosure was given to appellant by appellee until request was made for payment of the policy.

The fourth paragraph is based on a statute of New York, but, for reasons stated in the brief, appellant raises no question thereon.

A demurrer to each paragraph of reply, for want of facts, was sustained, and, appellant refusing to plead further, the court rendered judgment that appellant take nothing by this action, and that she be forever estopped from asserting any further right or claim under said policy.

We adopt the concise statement in the able brief of appellant, which is as follows: "In this appeal the three principal propositions of law arise on the sufficiency of appellee's answer, and on the sufficiency of the second and third paragraphs of appellant's reply." These questions will be considered in the order named.

It is the claim of appellant that the answer, being based on an alleged foreclosure, under the pledge agreement and in conformity to the stipulations therein, is bad be-

1. cause the requirements of a foreclosure under the law are not shown. It is argued that the process of foreclosure stipulated for in the pledge agreement is repugnant to public policy, because, in effect and result, it destroys the equity of redemption. The validity of the loan agreement is assailed by appellant, because it denies a reasonable time after default in which to exercise redemption, makes the default and power to foreclose simultaneous events, and provides for a summary process of foreclosure susceptible of instant consummation.

So much of the loan agreement as is relevant to this question reads thus:

"(4) That said loan shall become due and payable (a) either if any premium on said policy, or any interest on said loan is not paid on the date when due, in which event said pledge shall, without demand or notice of any kind, every demand and notice being hereby

waived, be foreclosed by said company, by deducting the amount due on said loan from the reserve on said policy.”

It is pointed out that the failure to pay either the premium on the policy or the interest on the loan on the date when due constitutes a default, and grants to the creditor the power to foreclose the pledge; that the mode of foreclosure selected is the summary process of “deducting the amount due on said loan from the reserve on said policy.” It is argued that it is quite apparent that a reasonable time could not intervene after the default and before foreclosure in which to exercise redemption. Appellant cites various authorities to sustain the proposition that where a contract, mortgage or pledge attempts to provide that upon default the right of redemption shall cease, and the property shall become the absolute property of the pledgee, such a provision is ineffective. In the contract before us, however, there is the express provision, in case of default, for ascertaining the value of the policy, pledged or assigned according to a rule therein set forth; a provision for the application of this value to the payment of the debts, so far as may be required, and a provision as to the disposition of the remainder. These provisions have been followed. The federal court in the case of *In re Mertens* (1906), 144 Fed. 818, 75 C. C. A. 548, considers the adjudicated cases where there was authority, upon default in the payment of any part of the indebtedness, to sell collateral at public or private sale, with or without notice, with the right on the part of the pledgee to purchase it, and says: “If this was such a sale as was authorized by the terms of the pledge, we do not doubt that the bank, in making it, was within its rights, and that no rule of the common law or doctrine of equitable jurisprudence, and none of the provisions of the bankruptcy act, can be invoked to defeat or invalidate it.”

The loan agreement in question provides for giving the insured the benefit of the full value of the policy ascertained

by a fixed standard. The policy-holder had time in which to pay the premium or to repay the loan, and the claim, that the beneficiary could borrow and keep the money which constituted the reserve, and then be entitled to the benefit of the additional insurance, which the reserve would have purchased had the money not been borrowed, cannot be allowed.

In support of the second paragraph of reply, it is argued that the statute entered into and became a part of the con-

tract and the provisions therein, and that the loan

2. was conditioned upon the valid consent of appellant; that the loan agreement entered into, being one of suretyship, was void, and was not one of valid consent of appellant; that under the statute and decisions of the State of New York, appellant held an absolute and vested interest in the policy from the moment it was issued, and it required some valid act on her part to destroy that interest. Appellant contends that the parties did not intend by the agreement to contravene the statute; that they contracted with due regard to the statute, and that the statute entered into and became a part of the contract itself; that, reading the statute into the policy, the loan was to be made only when a valid consent of the wife thereto was procured.

It is argued that as the reply shows that appellant was a resident of Indiana, that the loan agreement was executed in this State, and that the money was paid to her husband here, the attempt to make it a contract of New York is ineffectual; that the contract, being in violation of an express statute of this State, is void, and there was no valid consent on the part of the wife to the loan. §7855 Burns 1908, §5119 R. S. 1881.

The policy and the loan agreement are New York contracts, and are governed by the laws of the State of New York, and are not governed by the Indiana statute. The policy conferred certain rights on appellant as beneficiary,

but she took the rights thus conferred on her, subject to the limitations and provisions in the policy contained. The

statute expressly authorizes the wife to assign the

3. policy, with the written consent of the husband. The

policy required the company to make said loan to the insured upon his demand. The policy is not such as the New York statute contemplated. The statute contemplates a contract made by the insurance company directly with the wife, either in person or through an agent, as the case may be. When thus taken, it was the property of the wife and her children, and theirs alone. In this case, the insurance

was payable to the wife should she survive the hus-

4. band, otherwise, to his representatives. The “in-

sured,” specifically on the face of the policy stated to be Charles D. Eagle, “herein called the insured,” was expressly authorized to change the beneficiary at any time. Because of the last-named provision, the beneficiary did not have a vested right in the policy. *Equitable Life Assur. Soc., etc., v. Stough* (1910), 45 Ind. App. 411, and cases cited. If the policy should reach the accumulation

5. period—July 13, 1917—the insured, Charles D. Eagle,

and not the appellant, would get the various options,

and would be entitled to receive all the money due. In the case of *Eadie v. Slimmon* (1862), 26 N. Y. 9, 82 Am. Dec. 395, cited by appellant, the court makes clear the character of the contract contemplated by the statute of that state. It also makes clear the distinction between a contract with the wife and a contract with the husband for her benefit. In the case of *Whitehead v. New York Life Ins. Co.* (1886), 102 N. Y. 143, 6 N. E. 267, 55 Am. St. 787, which is cited in the case of *Shipman v. Protected Home Circle* (1903), 174 N. Y. 398, 67 N. E. 83, 63 L. R. A. 347, and is relied on by appellant, Judge Finch, speaking for the court, said: “All three of the life insurance policies sought to be revived and enforced in this action purport on their face to be contracts with the wife as the party assured, and

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not at all with the husband, who stands in the policies as simply the life insured, his conduct and death furnishing the contingencies upon which the liabilities of the insurer are made to depend. As the relation was tersely described on the argument, the contract is about the husband but not with him.”

The authorities cited by appellant do not uphold the proposition that the loan agreement is to be treated as an

Indiana contract governed by the Indiana statute as

2. to married women’s contracts. In the case of *Garri-
gue v. Kellar* (1905), 164 Ind. 676, 69 L. R. A. 870,
108 Am. St. 324, the rule is thus declared: “A contract must
be construed and its validity determined under the laws of
the state where it is executed, unless it can be fairly said
that the parties at the time of the execution clearly mani-
fested an intention that it should be governed by the laws
of another state.”

In the case of *Burns v. Burns* (1907), 190 N. Y. 211, 82
N. E. 1107, the parties lived in different states, and the con-
tract (an insurance policy) provided that it should be gov-
erned by the laws of Ohio, the state where the company’s
home office was located. The court held that the insured
“had the right, notwithstanding his being a nonresident of
Ohio, to agree that the contract of insurance should be gov-
erned and construed by, and according to, the laws of that
state only,” and that such agreement would be carried out.

This court has held that where the provisions for the loan
are contained in the very instrument through which the

married woman acquires her rights, the statutory in-

6. hibition against suretyship contracts cannot be in-
voked, because she takes her rights in the insurance,
subject, also, to the obligations and right of the company to
make the loan and to be protected thereon by the assign-
ment of the policy. *Union Cent. Life Ins. Co. v. Woods*
(1894), 11 Ind. App. 335, 339.

Similar statutes of other states have been construed in

cases where the same objection has been raised, and it has been expressly decided that, notwithstanding the statute, a wife who is named as beneficiary in a policy of insurance on her husband's life has capacity to join him in an assignment of it, and is bound by her act. *Herr v. Reinoehl* (1904), 209 Pa. St. 483, 58 Atl. 862.

The provision of the policy before us is that "the company will make advances to the insured as loans on this policy," setting out the conditions, among which is the following: "This policy shall be duly assigned to the company as collateral security for the loan."

In the case of *Union Cent. Life Ins. Co. v. Woods, supra*, the court said: "We think it is otherwise, however, where the policy expressly provides for a restriction or limitation of the wife's interest, or makes it depend upon a future contingency, such as an arrangement for a loan of money from the company to the husband and a repayment of the same out of the proceeds of the policy, when due. Whatever may be considered the true consideration underlying the insurance, the wife cannot be said to possess a greater interest in the policy than is given her by the terms thereof. When she acquires the title to the same, upon execution and delivery, she takes such title burdened with all its conditions and limitations. She can receive no more insurance, in other words, than the insured has contracted for in her behalf. If the insured has, therefore, stipulated for a loan to himself, to be paid out of the insurance money when it becomes due, by an acceptance of the policy she assents to the deduction of such loan from such proceeds, and she cannot afterwards be heard to deny the company's right to make such deduction."

The third paragraph of reply is based on an equitable estoppel, namely, the conduct of appellee in agreeing to be lenient with appellant and her husband, and granting

7. to them time after maturity of the debt in which to pay it. It is argued that this amounts to a waiver,

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on the part of appellee, of its rights to proceed without demand for payment, and it could not, after it had waived its right, proceed to foreclose the pledge, without giving notice of its intention to withdraw the grace in payment; that this is true, even though the loan agreement waived demand and notice in the first instance. *Toplitz v. Bauer* (1900), 161 N. Y. 325, 55 N. E. 1059. The facts stated in the case last named are widely different from those here involved. That case does not lend support to the claim of appellant. There, the policy had been transferred to a third person for a loan which had been carried, with repeated extensions on it, from time to time, the last one extending beyond the time of the surrender of the policy, and it was finally surrendered by the holder to the company when the insured was practically upon his deathbed.

The pleading does not show that the promise to wait a reasonable time was violated. It does show that the company waited until December 31, 1906—nearly six months. It is not shown that appellant was injured thereby. *Dudley v. Pigg* (1898), 149 Ind. 363; *Taylor v. Patton* (1903), 160 Ind. 4. To the same effect see *First Nat. Bank, etc., v. Leland* (1898), 122 Ala. 289, 25 South. 195, and *Porter v. Armstrong* (1904), 134 N. C. 447, 46 S. E. 997.

Apart from the rulings complained of, appellant could not recover, because the facts admitted by the pleadings showed that there was an indebtedness due to appellee, the payment of which was a condition precedent to the automatic extension of said insurance.

Judgment affirmed.

Roby, J., did not participate. Myers, C. J., absent.

APPELLATE COURT OF INDIANA,

Illinois Cent. R. Co. v. Fairchild—48 Ind. App. 300.

ILLINOIS CENTRAL RAILROAD COMPANY v. FAIRCHILD.

134. Filed May 17, 1910. Rehearing denied November 29, 1910. Transfer denied June 29, 1911.]

TRACTS.—Releases.—Consideration.—Contradicting.—Railroad.—Negligence.—A recital in an alleged release of a claim against a railroad company, that the consideration for such release was the sum of \$250, may be contradicted by proof of the consideration. p. 301.

MASTER AND SERVANT.—Railroad.—Injuries.—Releases.—Promises.—Work.—Where a servant was injured by a railroad company and the company's claim agent offered him \$250 and a "lifetime job" for a release, and the instrument of release, which was to mention the "lifetime job," was sent to him for execution, and he refused to execute it but wrote to the claim agent answering that he had nothing to do with positions and that the plaintiff "could not expect" anything until the release was signed, that after the release was signed such agent would take up the matter of employment and see if anything could be done, the plaintiff took the release to the superintendent who told the plaintiff to sign the release and he would get the money and the job, the jury was warranted in finding that the company agreed to give the money and the position for such release.

MASTER AND SERVANT.—Railroads.—Injuries.—Releases.—Consideration.—Repudiation of Part.—Estoppel—A railroad company offering to give its injured servant \$250 and a "lifetime job" in consideration of a release cannot insist upon the validity of the release and at the same time deny its agents' authority to give an injured servant a "lifetime job." p. 304.

in the Superior Court of Vanderburgh County; *Alexander* vs. *Fairchild*, Judge.

on by Chester Fairchild against the Illinois Central Railroad Company. From a judgment for plaintiff, defendant appeals. *Affirmed*.

Williamson and *John G. Drennan*, for appellant.
Mark B. Posey and *William D. Hardy*, for appellee.

1, J.—The complaint is in one paragraph. It is stated therein that appellee was in appellant's service as

yard brakeman, and while engaged in said work received injuries that resulted in the loss of a leg. It is further averred, that on January 30, 1905, defendant promised to pay plaintiff, in full settlement and satisfaction for said injury and damage, the sum of \$250, to reemploy him, and to give him permanent employment from March 1, 1905, for and during the period of his natural life, at such labor as he should have the ability to perform, and to pay him a reasonable and fair compensation therefor; that defendant required, as a condition to said promise and agreement, and as a further consideration therefor, that plaintiff should execute a release to defendant, releasing it from all liability for damages and all claims and rights whatever growing out of said injury, and relinquishing all claims and rights to bring suit therefor; that plaintiff agreed to the terms of said contract of settlement, and thereafter did execute and deliver to defendant said release, which was accepted by defendant as a fulfilment of said contract by plaintiff.

The complaint then alleges that on August 1, 1905, defendant employed plaintiff; that on January 10, 1906, defendant wrongfully discharged plaintiff, and has ever since refused, and still refuses, to reemploy him, and that plaintiff was able, ready and willing to continue in the service of defendant.

The issue was made by a denial. A trial by jury resulted in a verdict and judgment for \$1,800, which was reduced by a remittitur to \$1,200.

Appellant introduced in evidence a written instrument, by the terms of which appellee released it from liability for damages. The consideration for such release is

1. stated, by way of recital, to be \$250. The true consideration was, therefore, under all the authorities, open to proof. *Pennsylvania Co. v. Dolan* (1893), 6 Ind. App. 109; *Stewart v. Chicago, etc., R. Co.* (1895), 141 Ind. 55; *Indianapolis Union R. Co. v. Houlihan* (1901), 157 Ind. 494, 54 L. R. A. 787.

The evidence supports the allegations of the complaint. Appellee lost his leg while in appellant's service. He lived at Evansville, and subsequently went to Chicago, 2. where he had an interview with appellant's general claim agent, who proposed to give him \$250 and "a lifetime job," in consideration of a release. Appellee seems to have been more concerned about the job than the money, and returned home with the understanding that the release, voucher and a letter to the assistant superintendent at Evansville, with regard to the employment, would be there almost as soon as he was. The voucher and release were handed to him in a few days, but the letter to the superintendent was not with them. He did not execute the release, but later wrote to the claim agent, calling his attention to the fact that a position was soon to be vacant, which he could fill, but that the official having authority told him that it was partly promised. The concluding part of the letter was as follows:

"You know it is not everything I can do, the shape I am in. I am ready to work at any time. Please have them place me as soon as possible, as I need the work, Mr. Losey. I received voucher February 6. Still holding it, waiting for information in regard to job. Hope you will attend to this at once, and oblige,
Chester Fairfield."

In answer to this, the claim agent wrote that he had nothing to do with furnishing positions to employes; that he had not promised appellee a position, further stating: "I had no authority to make any such promise, and never do. * * * However, you could not expect to be placed at work until you had executed a release. This release is embraced in the voucher, and I do not see any purpose in holding it. After you have advised me that you have executed the release and cashed the voucher, I will take the matter up with Mr. Sheuing, and see whether it is consistent for him to do anything for you."

Appellee went to the superintendent who dipped a pen in

ink and said: "Sign that and go down and get the money, and you will get the job. The job is ready for you as soon as you sign this release." He still did not sign, and the superintendent called the freight agent, and told him to take appellee over to the freight office and show him the job he was to have. The freight agent went with him, and in his presence interviewed one of the clerks, to whom he said that appellee was a cripple, and that we will have to look out for him and give him a job. The clerk said he was willing to change to something else paying equally as well, and the freight agent said to appellee: "Now you be ready to go to work on March 1. I will make a change with Mehl-ing [the clerk], and put you in his place." The release was signed on February 28. Appellee was not put to work March 1, but began in August. He kept the place five or six weeks, was then transferred to another place, and in January was given a job at Mattoon, Illinois, which required him to do work that he could not do in his crippled condition, since which time employment has been refused.

These facts are not only shown by the evidence of appellee, but are largely in the record though the testimony of the other persons concerned, and the finding is not only in accord with the evidence, giving it the view that is most favorable to appellee, as we are required to do, but it is in accord with the overwhelming weight of evidence.

Appellant's principal contention is that the contract was made with the claim agent, and that his letter, denying his authority to make such a contract, conclusively shows that the essential meeting of minds never took place and, therefore, no contract was ever made. This is too narrow a view. The claim was that the contract was made by appellant corporation, and the evidence clearly shows that through the representations and promises of employment by appellant's agents, acting within the scope of their respective duties, appellee was induced to execute the release in question. Indeed, the letter of the claim agent does not bear the con-

struction placed upon it by counsel. The denial referred to is instantly qualified by "However, you cannot expect to be placed at work until you have executed a release."

The implication that the execution of the release would procure the employment is irresistible, and when taken with the subsequent statements and actions of those who did have authority "to furnish positions to employes," the letter comes very far from sustaining the contention. It is suggested that what was said and done with regard to employment was said and done as a matter of humanity to a faithful and unfortunate employe. The suggestion does not accord with what was done in that regard after the release had been procured.

That the consideration for the release included the promise of employment being proved, the principle expressed by

the maxim "he who derives the advantage ought to

3. sustain the burden" applies, and appellant, while it holds and asserts the release, cannot refuse to pay the price for which it was given. *American Car, etc., Co. v. Smock* (1911), *post*, 359; *Meridian Life, etc., Co. v. Eaton* (1908), 41 Ind. App. 118.

Various minor matters are mooted, but none of them is of controlling importance.

The judgment is affirmed.

NORRIS ET AL. v. KENDALL.

[No. 7,246. Filed February 24, 1911. Rehearing denied March 15, 1911. Transfer denied June 29, 1911.]

1. NEW TRIAL.—*As of Right.*—*Joining Causes where New Trial is not Demandable.*—Where a complaint consists of two or more paragraphs, on one of which a new trial as of right is demandable, and on the other it is not, a new trial as of right should not be granted, where the judgment rests upon both, even though a cross-complaint was filed to quiet title. p. 306.
2. NEW TRIAL.—*Statutory.*—*Annulling Title.*—In a suit to annul and cancel a deed procured by imposition and unfair means, a new trial as of right is demandable. pp. 306, 308.

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3. TRUSTS.—*Constructive*.—*Equity*.—Where a person obtains the legal title to another's land by fraud, by violation of a confidential or fiduciary relation, or in any other unconscionable manner, equity impresses a constructive trust upon the land in favor of the beneficial owner. p. 307.
4. NEW TRIAL.—*Statutory*.—The statute granting a new trial as a matter of right (§1110 Burns 1908, §1064 R. S. 1881), is mandatory. p. 308.
5. APPEAL.—*Affirmance*.—*Death*.—Where an appellant died after submission but before the decision affirming, a judgment of affirmance will be made as of the date of submission. p. 308.

From Rush Circuit Court; *L. L. Broaddus*, Special Judge.

Suit by Alfred Kendall and Bessie E. Norris against Marcus A. Kendall. From a judgment for defendant, plaintiffs appeal. *Affirmed*.

Douglas Morris, Watson, Titsworth & Green, Louis B. Ewbank and Henley, Matson & Gates, for appellants.

Claud Cambern, B. L. Smith, Donald L. Smith, John H. Kiplinger and John D. Megee, for appellee.

IBACH, J.—This is an action brought originally by appellant Alfred Kendall, against appellee, to compel said appellee to reconvey to said appellant certain land in Rush county, Indiana, and to quiet his title thereto.

The complaint is in two paragraphs. The first paragraph alleges that the land described in the complaint was owned by plaintiff Alfred Kendall, and by him was conveyed to said Marcus A. Kendall, without consideration, and under a promise that he would reconvey it to Alfred Kendall, after certain trust purposes had been performed; that such trust purposes had been accomplished, and that he had repeatedly demanded a reconveyance of the land to him by said Marcus A. Kendall, but that he refused to make such conveyance; that said Marcus A. Kendall immediately laid claim to the land, and is now in possession thereof, without right; that his claim is unfounded and without right, and adverse to said plaintiff's interest therein.

The second paragraph of complaint is one in the usual form to quiet title. Issue was joined by an answer in general denial, also by a special answer addressed to the first paragraph of complaint, which pleads matters in bar of appellant Alfred Kendall's right to recover upon the first paragraph of his complaint. Appellee also filed a cross-complaint, alleging title in himself to the land, and asking to have his title quieted therein. After the cause was tried, on motion of appellee a new trial as of right was granted.

Upon the conclusion of the first trial, a commissioner was appointed by the trial court to convey the land to Alfred Kendall, and as soon as a conveyance had been made to him he at once conveyed the land to Bessie Norris, one of the parties to this appeal. As soon as she obtained title, she petitioned to be permitted to appear in said cause, which petition was granted, and she immediately filed a motion to set aside the order made by the court, granting appellee a new trial as of right, which motion was overruled and exceptions duly taken. The issues were then reformed, the cause proceeded to trial with such new party, and a second trial resulted in a decree for appellee.

Appellants in this case insist that the order of the court granting a new trial in said original cause was erroneous, and earnestly argue that the case was not one in which

1. the losing party was entitled to a new trial as of right. We agree that the rule is that where a cause of action proceeds to judgment, which embraces a substantive cause of action, in which a new trial as of right is not allowable, then, even though it embraces other causes in which a new trial as of right is allowable, the policy of the law is to regard that cause of action as controlling in which a second trial as of right is not permitted, notwithstanding the cross-complaint, in which one of the parties asks to have his title quieted. We cannot agree
2. with appellant, however, that this case comes within the rule here announced. The land in question was

conveyed to Marcus A. Kendall for a specific, definite purpose, without consideration, and upon an oral promise to reconvey when the purpose of such deed was fulfilled. There is no direct allegation of fraud in the complaint, but it appears therein that appellee was the son of the grantor of the deed, and occupied a confidential relation with his father; that the conveyance was made upon the advice of said son, for a definite purpose, without consideration, and upon his oral promise to reconvey, with the further agreement on his part that such deed was to remain in escrow with a third party until a certain suit then pending was disposed of, and said deed was not to be placed on record; but instead, appellee obtained said deed from the party to whom it had been delivered to be held in escrow, and had it recorded shortly after it was executed. It also appears that after the purposes for which the conveyance was made were accomplished, a demand was made for the reconveyance of said property, in accordance with the terms of the original conveyance, which was refused, and a claim of title was asserted to the property by said Marcus A. Kendall.

The complaint is not an ordinary one to set aside a fraudulent conveyance of land for the benefit of creditors, but is a suit to annul a conveyance, and revest the title in an owner who had been induced to part with it by imposition and unfair means.

It is a well-settled rule of law that when a party obtains the legal title to property, not only by fraud or by violating confidential or fiduciary relations, but in any
3. other unconscionable manner, so that he cannot equitably retain the property which really belongs to another, equity carries out its theory of double ownership, equitable and legal, by impressing a constructive trust upon the property in favor of the one who is entitled to it, and who is considered, in equity, the beneficial owner. 2 Words and Phrases 1476, and cases cited.

It appears that the decree rests upon the first paragraph

of this complaint. Under this paragraph, the title to the land was directly in question, and it seems to have been so considered by both appellee and appellants in the trial of the cause in the court below, and the title was necessarily adjudicated by such trial. The case, therefore, comes fully within the doctrine declared in the case of *Physio-Medical College v. Wilkinson* (1883), 89 Ind. 23.

The statute (§1110 Burns 1908, §1064 R. S. 1881) providing for a new trial as of right in all cases where the title to land is directly in question, is mandatory, 4. and the court has no discretion, but must grant a new trial to the losing party, upon a strict compliance with the provisions of such statute. *Anderson v. Anderson* (1891), 128 Ind. 254; *Physio-Medical College v. Wilkinson*, *supra*; *Warburton v. Crouch* (1886), 108 Ind. 83; *Tomlinson v. Tomlinson* (1904), 162 Ind. 530.

The statute referred to, in very express terms gives a new trial as of right in a case of this nature, and it would have been error for the court to refuse appellee's application. This is the only question presented by this appeal, and since we have concluded that the title to the property was at all times involved in the controversy, and was the principal issue in the case, the court committed no error in granting appellee's motion for a new trial as of right.

It appears that since the filing of this appeal Alfred Kendall has died, and the court below having committed 5. no error in granting the motion for a new trial as of right, this cause is affirmed, as of date of submission.

VERNON, GREENSBURG AND RUSHVILLE RAILROAD
COMPANY v. WASHINGTON TOWNSHIP OF
DECATUR COUNTY.

[No. 7,610. Filed June 30, 1911.]

1. PLEADING.—*Demurrer.—Defect of Parties.*—A demurrer for defect of parties must set out the names of the proper parties. p. 313.
2. PLEADING.—*Demurrer.—Want of Facts.—Defective Parties.*—A demurrer for want of facts does not raise the question of a defect of parties. p. 313.
3. CORPORATIONS.—*Wrongful Transfer of Stock.—Remedies.*—The owner of stock wrongfully transferred upon the books of a corporation may elect to sue in equity or at law. p. 314.
4. CORPORATIONS. — *Stock. — Wrongful Transfers. — Townships. — Railroads.*—A township whose stock in a railroad company was unlawfully sold and transferred, and reissued by the company may, in an equitable proceeding, compel such company to cancel such stock and reissue the stock to such township. pp. 314, 316.
5. SPECIFIC PERFORMANCE.—*Contracts Relating to Personal Property.—Value.*—Specific performance lies to enforce contracts relating to personal property only when such property has a peculiar value. p. 316.
6. CORPORATIONS.—*Wrongful Transfer of Stock.—Reissuing.—Complaint.*—A complaint by a township to compel a railroad company to cancel stock issued to one to whom the township trustee had unlawfully assigned it, and to compel the company to reissue the stock to the township, does not need to contain a prayer for alternative relief in damages in case the court should refuse to order the stock canceled and reissued. p. 318.
7. CORPORATIONS.—*Wrongful Transfer of Stock.—Reissuing.—Complaint.—Value.*—A complaint to compel a corporation to cancel stock unlawfully held by another and to compel the reissuance of such stock to the owner, alleging the par value thereof, but failing to allege the real value, is sufficient, the *prima facie* presumption being that the par value constitutes the real value. p. 318.

From Bartholomew Circuit Court; *Marshall Hacker*,
Judge.

Vernon, etc., R. Co. v. Washington Tp.—48 Ind. App. 309.

Suit by Washington Township of Decatur County against the Vernon, Greensburg and Rushville Railroad Company. From a decree for plaintiff, defendant appeals. *Affirmed.*

Baker & Richman, for appellant.

Donaker & Spaugh and *Goddard & Craig*, for appellee.

IBACH, J.—Appellant was defendant and appellee plaintiff in the court below. The suit was brought in equity to cancel a transfer of 750 shares of stock of appellant corporation, certificates of which, numbered nineteen, twenty-seven, thirty-five, thirty-nine, forty-five and forty-eight, were assigned by Charles H. Reed, former trustee of the township, to John C. Davie, attorney, delivered by Reed to Nathan G. Swails for said Davie, or for M. E. Ingalls, and afterwards were surrendered to appellant, whereupon new certificates were issued and the shares transferred on the books of the corporation to J. D. Layng. Besides asking that said assignment be declared invalid, appellee also prayed that appellant be ordered to re-register said shares on its books in the name of appellee, and to issue new certificates therefor. The sum of \$150 received by Reed as part consideration for the assignment was paid into court. Appellee offered to pay to appellant \$10, alleged to be the balance of said consideration.

The original complaint was filed in the Decatur Circuit Court with Charles H. Reed, Dwight W. Pardee, John C. Davie and Nathan B. Swails joined with appellant as parties defendant. Before the cause was put at issue John C. Davie perfected a change of venue to the Bartholomew Circuit Court, where all the proceedings on which error is assigned took place. The complaint was thrice amended, and as it finally stands in the record appellant is the only defendant.

A demurrer to the amended complaint was filed, which assigns the following statutory grounds: (1) The plaintiff has not legal capacity to sue. (2) There is a defect of parties plaintiff. (3) Said amended complaint does not

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state facts sufficient to constitute a cause of action against said defendant. (4) As appears upon the face of said amended complaint, there is a defect of parties defendant.

Said demurrer was overruled, an answer in denial was filed, and upon a trial by the court a finding was made for appellee.

A decree was entered that appellee is the owner of said 750 shares of stock as represented by certificates numbered nineteen, twenty-seven, thirty-five, thirty-nine, forty-five and forty-eight; that appellant, by its secretary, assign and deliver said certificates to appellee, and register the stock in its books in the name of appellee; that appellee recover costs; that upon compliance by appellant with the judgment, as aforesaid, appellee pay to appellant \$10 for its school supplies, and that the clerk of the court pay to appellant the sum of \$150, now held as a tender.

The errors assigned are the overruling of the demurrer to the amended complaint, and of appellant's motion for a new trial. The second of these has been waived by failure to discuss it.

The third and fourth grounds for demurrer have been argued, and, better to consider them, we set forth the complaint in full, omitting the caption.

“The plaintiff, for amended complaint, says: That said plaintiff is a political division of said State for township purposes; that defendant is a corporation organized and existing under and pursuant to the laws of the State of Indiana for railroad purposes, and domiciled therein, with a line of railroad extending from the town of Vernon, into and through the city of Greensburg, in the county of Decatur and State aforesaid, to the city of Rushville, in said State, with the principal office at Greensburg; that said company held its last annual election of officers in said city; that William W. Hamilton is one of the directors of said company, and resides in Decatur county, Indiana; that Dwight W. Pardee is the duly acting secretary of said cor-

poration, and resides in the city of New York, in the State of New York, and that he has the custody of its books, and its stock register book; that the stock of said company is transferred on said book of said company; that heretofore, to wit, on the — day of —, 18—, said corporation issued to said plaintiff certain stock, evidenced by its certificates therefor, aggregating 750 shares of the par value of \$75,000, being of the stock of said company; that a more particular description of said stock cannot be given for the reason that said plaintiff does not have said certificates nor a copy thereof, and that said defendant railroad company does have the original stock book therefor; that said shares of stock in said company are the property of said township; that thereafter, on September 1, 1902, Charles H. Reed was the duly elected, qualified and acting trustee of said township, and on said date, and while so acting as trustee, said Reed pretended to sell said shares of stock and assign the certificates therefor to John C. Davie, and that he delivered to Nathan G. Swails said certificates, with a written assignment thereon to said Davie, and said township has never since been in possession thereof; that said Swails paid said Reed, as such trustee, the sum of \$150, and bartered some school supplies, of the probable value of \$10, for said assignment to said Davie, as aforesaid; that said Reed, as such trustee, never gave notice as required by law, or any notice, of the sale of said property belonging to said township, as aforesaid, and no notice of said sale was ever given; that thereafter, on the — day of —, said stock was transferred on the books of said railroad company in the name of J. D. Layng, whose Christian name is unknown. Said plaintiff further avers that on November 27, 1906, it made a tender of \$150 to said Davie, and in writing demanded the return of said certificates to said township, and said tender and said demand were by him refused; that said Davie claimed and claims that \$750 was the amount paid by him through said Swails for said stock. Said plaintiff now

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brings said \$150 into court, and offers it for the benefit of the person to whom the court may decide it belongs, and offers to pay and restore the value of such school supplies, as the court in equity may order and direct. Said plaintiff avers further that on the — day of ———, 1906, it made a written demand upon said defendant, Vernon, Greensburg and Rushville Railroad Company, and before the bringing of this suit, for the cancelation of said pretended assignment of said stock, and that the register of stock of said company shows said plaintiff to be the real owner thereof; that said demand was never complied with, and said defendant has failed and refused, and still refuses, to comply therewith; that said assignment and said claims of said defendant are clouds upon the title of plaintiff to said property. Wherefore said plaintiff prays that it be declared the owner of said stock; that said assignment be found invalid, and held for naught and canceled; that said defendant, Vernon, Greensburg and Rushville Railroad Company, be ordered and directed to register said shares of stock in the name of said township, and issue its certificates therefor; that said court direct said plaintiff to pay said \$150 to whom it belongs, and for all proper relief.”

It is well established by the Supreme Court of this State that a demurrer for defect of parties must designate the proper parties in order to present a question. The

1. fourth specification of the demurrer in this case is “that, as appears on the face of said amended complaint, there is a defect of parties defendant.” This specification does not name the person or persons who should be, but who are not, made parties defendant, and therefore does not properly present the question. As a demurrer

2. for want of facts does not raise the point of defect of parties, appellant is in the same situation as if it had not demurred for defect of parties, and had waived such objection. *Kelley v. Love* (1871), 35 Ind. 106; *Gaines v. Walker* (1861), 16 Ind. 361; *Vansickle v. Erdelmeyer*

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(1871), 36 Ind. 262; *Marks v. Indianapolis, etc., R. Co.* (1871), 38 Ind. 440; *Musselman v. Kent* (1870), 33 Ind. 452; *Durham v. Bischof* (1874), 47 Ind. 211; *Leedy v. Nash* (1879), 67 Ind. 311; *State, ex rel., v. McClellan* (1894), 138 Ind. 395; *Boseker v. Chamberlain* (1903), 160 Ind. 114.

Appellant, in arguing that the complaint does not contain facts sufficient to constitute a cause of action, first announces the elementary propositions that where relief is sought in a court of equity, the complaint must contain facts showing that equity has jurisdiction, and that equity will not relieve if there is an adequate remedy at law. It then claims that in cases where shares of stock have been wrongfully or negligently transferred by a corporation, the injured stockholder has an adequate remedy at law. It further urges that nothing appears in appellee's amended complaint to indicate that the stock sought to be recovered has any value whatever, and that if the shares are worthless appellee ought not to recover, for equity does not concern itself with trifles.

Where shares of stock have been wrongfully or negligently transferred by a corporation, there is, without doubt, a remedy at law. But in such cases the party whose

3. demand for a transfer on the books of the corporation has been refused has a choice of remedies.

4 Thompson, Corporations (2d ed.) §4406, 4420-4423; 26 Am. and Eng. Ency. Law 888.

The complaint in this case is drafted on the theory that appellee was and is still the owner of the stock in suit; that,

- by a wrongful act of its statutory agent, for a con-

4. sideration, the evidence of the ownership of the stock was turned over to another, and that the corporation, which is a trustee for the stockholders, allowed the old certificates, evidencing appellee's ownership of the stock, to be canceled, issued new certificates to another, and registered this stock in the name of the other. Appellee does not claim the stock by a merely equitable title, as one asking specific performance of a contract to convey, but claims as the

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owner of the legal title, seeking to keep its own, and asking to be relieved from the consequences of a void sale.

The Indiana case most resembling the present one, is that of *Weyer v. Second Nat. Bank* (1877), 57 Ind. 198, and appellee's counsel inform the court that on the complaint in that case the complaint in the present case is based. In that case an executor had made a void sale of shares of stock in a bank. After his removal for insolvency, his successor brought suit against the bank and the purchaser to have such sale and transfer set aside, and to compel the issuance to him, as executor, of a certificate of such stock, or to recover the value thereof. The complaint was held sufficient as stating a cause of action against each defendant. There is substantially but one difference between the complaint in the case cited and this one. The complaint in the case cited contained a prayer asking for the reissuance of a certificate, or, if that could not be done, for a judgment for the value of the stock. The prayer in the present case is for cancelation of the assignment and reissuance of the certificate.

Thompson, in his work on corporations, states that "Shares of stock, when the subject of litigation, differ in so far as injunctive relief is concerned from ordinary personal property, that the equitable remedy is regarded as more beneficial and complete than any the law can give. When the proper officers refuse on demand to issue a certificate of stock to a person entitled thereto, he may enforce the issue and delivery of such certificates by a suit in equity. * * * The owner of stock sold under a void order has his remedy in equity to have the certificates issued under such void sale surrendered and canceled. * * * A transferee whose demand for a transfer upon the books of the corporation has been refused, has the choice of either of two remedies. If he prefers to have an interest in the corporation and hold his stock as an investment he may * * * proceed by a suit in equity to compel a transfer on the books of the

corporation and his recognition as a stockholder. But if he chooses, and is willing to accept the market price of the stock as his measure of damages, he may bring an action at law against the corporation for such wrongful refusal and recover the value of the stock as damages.” 4 Thompson, Corporations (2d ed.) §§4405, 4406, and cases cited.

A suit in equity does not lie for specific performance of a contract concerning personal property, unless it has a peculiar value. But in England shares of stock in a

5. private corporation are held to have such a peculiar value that equity will decree specific performance of a contract for their sale. While American courts have not in all cases gone so far, the most of them have held that a suit in equity will lie against a corporation to compel the transfer of stock on its books. In 2 Cook, Corporations (6th ed.) §391, it is said that a suit in equity is “the surest, most complete, and most just remedy for compelling a corporation to register a transfer of stock.” In 20 Ency. Pl. and Pr. 813, it is said that such a remedy is well established, and the one generally pursued.

The reasoning on which these assertions are based is well expressed in the case of *Cushman v. Thayer, etc., Jewelry Co.* (1879), 76 N. Y. 365, 32 Am. Rep. 315, in which

4. the court said: “The right of the plaintiff to maintain this action depends upon the question whether an equitable action will lie to compel a transfer of stock by a corporation to the owner of the same, or the plaintiff must seek a remedy by an action at law for damages. The latter action is frequently of no avail, and does not always afford complete and full redress. It is easy to see that a party may have become the owner or purchaser of stock in a corporation, which he desires to hold as a permanent investment, which may be at the time of but little value, in fact without any market value whatever, and its real worth may consist in the prospective rise which the owner has reason to anticipate will follow from facts within his knowledge. To

Vernon, etc., R. Co. v. Washington Tp.—48 Ind. App. 309.

say that the holder shall not be entitled to the stock, because the corporation, without any just reason, refuses to transfer it, and that he shall be left to pursue the remedy of an action for damages, in which he can recover only a nominal amount, would establish a rule which must work great injustice in many cases, and confer a power on corporate bodies which has no sanction in the law.”

In the case of *Westminster Nat. Bank v. New England Electrical Works* (1906), 73 N. H. 465, 62 Atl. 971, 3 L. R. A. (N. S.) 551, 111 Am. St. 637, the court said in words applicable to the present case: “To deny him relief by specific performance, upon the ground that he could recover damages at law, would be, in effect, to compel him to sell what he already owns at such a price as a jury might think it was worth.”

Additional reasons why such circumstances call for equitable relief are that shares of stock in a certain corporation are frequently not so easily obtained on the market that money damages can be said to be an adequate remedy where the possession of the shares is desired, and that shares often have a peculiar value to certain persons who wish them for the power they will give in controlling a corporation. These different considerations have influenced the courts, until the weight of authority holds that a suit in equity will lie against a corporation for the transfer of stock on its books.

In the present case there is yet stronger ground for equitable relief than if appellee had purchased stock, and the corporation had refused to transfer it on its books, for in this case the title of the property has never passed from appellee; but by a wrongful act of its agent it was deprived of the possession of property which it had held for a long time. These circumstances afford reasons why appellee, if it desires possession of its property, should not be compelled to accept money damages for its injury.

The court in the case of *Read v. Cumberland Tel., etc. Co.* (1894), 93 Tenn. 482, 27 S. W. 660, holds that if a corpo-

ration transfers a stockholder's shares upon its books, upon the assignment of the owner's agent, without requiring production of proof of the agent's authority, and the transfer proves to be unauthorized, the company will be compelled, at the suit of the shareholder, to reinstate him in his rights. This case squarely lays down the principle applicable to the present case. In 4 Thompson, Corporations (2d ed.) §4416, the rule is thus stated: "Equity will not only compel a corporation to make the transfer on its books in proper cases, but where stock has been transferred improperly or wrongfully by the corporation the original holder of such stock may by suit in equity compel the corporation to set aside such transfer and restore him to his rights as a stockholder."

The present complaint would be good under the authority of *Weyer v. Second Nat. Bank*, *supra*, without question, if it contained a prayer for alternative relief in damages.

6. Such prayer is not necessary to make the complaint sufficient, for, upon the facts stated, appellee is entitled to equitable relief, and need not pray for relief otherwise. In the case of *Tanner v. Gregory* (1888), 71 Wis. 490, 37 N. W. 830, the court held good a complaint against a corporation asking for the transfer of stock on its books, which contained no prayer for alternative relief in damages. We therefore hold the complaint sufficient to show that appellee has no adequate remedy at law, and that his proper relief is in equity.

Appellant further objects to the complaint, on the ground that there appears in it no allegations as to the value of the stock, or that the stock has any value, since the only allegation of value is that of the par value of the stock.

This contention is effectually disposed of by the case of *Walker v. Bement* (1911), — Ind. —. The court said: "The only objection seriously urged against the complaint is that it does not contain any averment that the stock described in

the mortgage had any market value and that the actual value of said stock is not stated. It is claimed by appellant that under a proper construction of the mortgage, only the actual value of such stock could be recovered; and that the complaint is insufficient for want of an averment showing the market value of such stock at the time it should have been returned, or in the event it had no market value, showing its actual value at such time. The par value of a share of stock in a corporation is *prima facie* its actual value. The complaint contains an averment of the par value of the stock, and this, in the absence of any allegation to the contrary, amounts to an averment that the stock was actually worth its face, and is sufficient as against a demurrer. The complaint must be held sufficient.”

The averment of the par value of the stock in the case at bar is a sufficient averment of value.

The complaint is sufficient, and no other error having been relied on for reversal of the cause, the judgment is affirmed.

Myers, J., did not participate.

PERU HEATING COMPANY v. LENHART ET AL.

[No. 6,967. Filed June 30, 1911.]

1. **TORTS.—*Joint and Several.***—If several persons are required to perform a duty their failure to perform it, or their negligence in performing it, renders them liable jointly and severally to one injured thereby. p. 324.
2. **TORTS.—*Contracts.—Damages.***—A defendant may be liable to the plaintiff in tort for damages caused by him, though no contractual relations whatever existed between them. p. 325.
3. **NEGLIGENCE.—*Heating Companies.—Turning off Heat.—Freezing.—Flooding.—Damages.—Proximate Cause.—Complaint.***—A complaint by tenants of the first floor of a building, alleging that the defendant landlord had such building piped for hot-water heat, that defendant heating company contracted with tenants of the second floor to furnish heat to them, that such tenants afterward notified such landlord and such company that they did not longer desire such heat, that such defendants so negligently turned off such heat that the pipes froze and burst, damaging the plaintiffs' goods on the first floor, states a cause

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of action against both defendants, and sufficiently shows that their negligence was the proximate cause of the damages. pp. 326, 328, 330.

4. CORPORATIONS.—*Public Service.—Heating Companies.—Duties.*—It is the duty of a heating company, furnishing heat to the occupants of a building, to use care commensurate with dangers to be apprehended from the furnishing of such heat. p. 328.
5. NEGLIGENCE.—*Proximate Cause.*—The proximate cause of an injury is the decisive cause. p. 329.
6. TORTS.—*Acts.—Conditions.*—If the defendant's original wrongful act or omission supplied the condition causing the subsequent act to be hurtful, he is liable therefor. p. 329.
7. CORPORATIONS.—*Heating Companies.—Natural Laws.—Notice.*—Heating companies are conclusively presumed to know of the natural laws of freezing, of the climate, and of the injurious results liable to flow from the bursting of pipes. p. 329.
8. CORPORATIONS.—*Heating Companies.—Negligence.—Interrogatories.*—In an action against a heating company and the owner of a rented building for negligence in disconnecting the hot-water heat therefrom, where the interrogatories show that the owner's servant was instructed by the heating company how to disconnect such heat, but where there is nothing in such interrogatories and answers thereto that can negative certain facts, provable under the issues, and which may be assumed as proved in favor of the general verdict, such answers do not overthrow a general verdict against such company. p. 330.
9. TRIAL.—*Wrongful Admission of Evidence.—When Harmless.*—In an action by tenants of the first floor of a building against the owner thereof and a heating company for their alleged negligence in turning off the hot-water heat in the second floor, producing conditions whereby plaintiffs' goods were damaged, evidence of the understanding of the owner's servant as to why such owner referred the servant to the heating company for instructions in turning off such heat instead of having such servant do it, is improper; but where the evidence given was but a restatement of what had been given before at the instance of both parties its admission was harmless. p. 332.
10. APPEAL.—*Weighing Evidence.—Principal and Agent.*—Where there is some evidence tending to show agency, a verdict founded thereon will not be disturbed on appeal. pp. 333, 337.
11. NEGLIGENCE.—*Joint Tort Feasors.—Verdict.—Favorable to One and Against the Other.—Interrogatories.*—Where joint tort feasors are sued and there is a general verdict against one thereof, and in favor of the other, but answers to the interrogatories show that both were liable, the court should render judgment on the answers to the interrogatories against the other, the

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amount assessed in the verdict against the one governing as to both. p. 335.

12. *APPEAL.—Verdict.—Interrogatories.*—Answers to the interrogatories to the jury control the general verdict only when they are in irreconcilable conflict therewith upon any supposable evidence within the issues; and in determining such question the court will consider only the pleadings, the interrogatories and the general verdict. p. 336.

13. *BILLS OF EXCEPTIONS.—Use of.—Cross-Appeals.*—Where appellant duly filed a proper bill of exceptions containing the evidence, and after notice to appellant, and its consent thereto, the cross-appellants secured from the court on appeal the right to assign cross-errors on the transcript of the original appellant, such action obviated the need for the filing of another transcript or bill of exceptions. p. 336.

From Miami Circuit Court; *Joseph N. Tillett*, Judge.

Action by William F. Lenhart and another against the Peru Heating Company and another. From a judgment for plaintiffs, said company appeals. *Affirmed.*

Antrim & McClintic and *Robert J. Loveland*, for appellant.

Walter C. Bailey, Henry S. Bailey, Charles A. Cole, Albert H. Cole, Shively & Switzer and *Cox & Andrews*, for appellees.

HOTTEL, J.—This is an action by appellees Lenhart and Simpson against appellant company and appellee Charles H. Brownell to recover damages for injuries to a stock of undertaking goods, alleged to have been caused by the negligence of said appellant company and Brownell.

The amended complaint was in one paragraph, to which a demurrer filed by each defendant was overruled and exception taken. The cause was put at issue by a general denial filed by each defendant, and was tried by a jury, which returned a general verdict in favor of defendant Brownell and against the Peru Heating Company, assessing damages in favor of Lenhart and Simpson in the sum of \$1,094.40, with answers to interrogatories. Appellant moved for judgment on the answers to interrogatories, and then for new

trial. The motions were overruled and exceptions saved. Appellees Lenhart and Simpson also filed separate motions for judgment in their favor on the answers to interrogatories, as against defendant Brownell, and a motion for judgment on the general verdict against defendant heating company, and then filed a motion for a new trial against defendant Brownell, who also filed a motion for judgment in his favor on the general verdict. The motions of Lenhart and Simpson for judgment on the answers to interrogatories, and for a new trial as against Brownell, were by the court overruled, with exceptions in their favor, and the court then sustained the motions of Lenhart and Simpson and of Brownell for judgment on the general verdict, and rendered judgment for appellees Lenhart and Simpson in the sum of \$1,094.40 against appellant and in favor of appellee Brownell, from which judgment appellant and appellees Lenhart and Simpson each prayed an appeal.

The following errors are relied on by appellant: (1) The overruling of its demurrer to the amended complaint. (2) The overruling of its motion for judgment in its favor on the answers to interrogatories. (3) The overruling of its motion for a new trial.

That part of the complaint necessary to a full understanding of the case and the questions presented for decision, is substantially as follows: Appellee Brownell was the owner of a three-story brick building in Peru, Indiana. Plaintiffs Lenhart and Simpson on and prior to February 8, 1905, were partners in the retail furniture and undertaking business in Peru, and occupied ground-floor rooms in said building, which they held "under a lease from said Brownell," the owner. Defendant Peru Heating Company owned and operated a central hot-water heating plant in the city of Peru, and furnished heat to consumers in said city, by its system of pipes extending from its central plant to the various business houses and dwellings. One of the rooms so occupied by said plaintiffs was at the time filled with

undertaking goods. Immediately above this room was a suite of office rooms, not at any time occupied, leased, used or controlled by said plaintiffs. In 1903, defendant heating company, under a contract with Brownell, installed in said building, except in the rooms so used by said plaintiffs, a system of pipes and radiators, by which the various rooms, except those occupied by said plaintiffs, were heated. The heat was brought into the basement by an inflow pipe, and the return circuit was by an outflow main, also in the basement. The radiators in said office rooms above the rooms of said plaintiffs were connected with the pipes and mains in the basement. During the fall of 1903, defendants caused the hot water to be turned into the building, including said office rooms so located immediately above plaintiffs' said undertaking establishment, and excepting the rooms so occupied by said plaintiffs. Thereafter said heating company furnished to the various tenants of said business block such heat for hire. A short time prior to February 8, 1905, defendants were notified by the new occupants of said office rooms "to turn the heat out" of such rooms. At or about the time of such change, and some time prior to February 8, 1905, in pursuance to such notice, defendants undertook to cut off the hot water from said office rooms, and to remove the heat therefrom. In so attempting to shut off the heat from said office rooms, and the flow of water through the pipes and radiators therein, defendants carelessly and negligently shut off the entire circulation of water in said rooms through said pipes, and carelessly neglected to drain the water from said pipes in said rooms, thereby creating a "dead end" in said pipe, in which water collected, and could not pass out, and the water so collected in said pipes was negligently and carelessly allowed by said defendants so to remain at the time and season of the year when, as the defendants well knew, the water therein was liable to freeze and burst said pipes, and no means were provided to prevent the freezing and bursting of said pipes.

About February 8, 1905, the water so standing in said pipes froze, and the pipes burst at or near the valve where the water was negligently and carelessly cut off. By reason of the freezing of the water and the bursting of said pipes, a large quantity of water was forced therefrom, and was precipitated into the room so used by plaintiffs for their undertaking business.

Defendants are sued as joint tort feasons, and the law applicable thereto is stated in the case of *Consolidated Ice Mach. Co. v. Keifer* (1890), 134 Ill. 481, 25 N. E. 799,

1. 23 Am. St. 688, 10 L. R. A. 696, in the following language: "And so, if several persons are jointly bound to perform a duty, they are jointly and severally liable for omitting to perform or for performing it negligently. All persons who coöperate in an act directly causing injury are jointly liable for its consequences, if they acted in concert, or united in causing a single injury, even though acting independently of each other." See, also, *Chicago, etc., R. Co. v. Marshall* (1906), 38 Ind. App. 217; *Baltes v. Bass, etc., Mach. Works* (1891), 129 Ind. 185, 188; *Ashcraft v. Knoblock* (1896), 146 Ind. 169; *Doherty v. Holliday* (1894), 137 Ind. 282; Deering, Negligence §395; Wharton, Negligence (2d ed.) §788.

Appellant bases its objection to the complaint practically on the same grounds that it urges in support of its motion for judgment on the answers to interrogatories, and against the sufficiency of the evidence, and we shall consider these objections more in detail than we otherwise would. The objection to the complaint is that it "does not disclose such a relation between appellees Lenhart and Simpson and appellant, that the latter will be answerable in damages to the former for the injuries complained of." As reasons for this contention, appellant urges that the complaint shows that appellee Brownell owned the building, in which the goods of Lenhart and Simpson were damaged, and the water-pipes and fixtures therein; that appellant's

service-pipes extended to said building, and there stopped; that Brownell had exclusive ownership and control of the water-pipes in said building; that the service of appellant never extended to the rooms occupied by appellees Lenhart and Simpson; that no contractual relation existed between them and appellant; that appellant's relations to Brownell's tenants never went beyond those of the merest licensee, extending only to such portions of the building and pipes therein as were, at the time of the injury complained of, being used by the renters of such building for heating purposes; that appellant's right to use, or have anything to do with said pipes in the rooms where the bursting complained of occurred, terminated some time prior to February 8, 1905, when such bursting occurred, viz., when appellant shut off the entire circulation of water in said rooms through said pipe, and that, therefore, appellant, at the time of the injury to said appellees' property, owed them no duty in connection therewith, for the violation of which it could be held accountable for damages for injury resulting therefrom.

Appellant's contention as to the facts disclosed by the complaint is practically correct, as far as it undertakes to state such facts; but it is in error in the conclusion

2. deduced therefrom—that it, at the time of the injury, owed appellees no duty, for the violation of which it could be held accountable in damages. It is not necessary that a contractual relation exist between the wrongdoer and the party injured by the wrong, in order that such party may have redress for the injury and damage resulting from the wrong done. *Stock v. City of Boston* (1889), 149 Mass. 410, 21 N. E. 871, 14 Am. St. 430; *Reagan v. Boston Electric Light Co.* (1897), 167 Mass. 406, 45 N. E. 743; *Ennis v. Gray* (1895), 87 Hun (N. Y.) 355, 34 N. Y. Supp. 379; *Murphy v. City of Indianapolis* (1902), 158 Ind. 238; *Heaven v. Pender* (1883), 11 Q. B. D. 503.

In 28 Am. and Eng. Ency. Law (2d ed) 253, "tort" is

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llows: "The word 'tort' means nearly the same expression 'civil wrong.' It denotes an injury otherwise than by a mere breach of contract; or, more accurately, a tort is one's disturbance of rights which the law has created, either in the abstract or in consequence of a relation which has been established between the parties."

definition in Bishop, Non-contract Law §4, is the following qualification: "Of course the wrong is of a sort which the law redresses, not a mere infractum of morals."

quoted legal maxim, "*sic utere tuo ut alienum non laedas*" is applicable. In 21 Am. and Eng. Ency. Law, this maxim finds expression in the following language from the leading case of *Heaven v. Pender*, which is particularly applicable to this case: "When a person is placed in such a position with regard to the property of another that it is obvious that if the former does not use reasonable care and skill in his own conduct he will cause injury to the person or property of the latter, a duty is imposed on him to use ordinary care and skill to avoid such injury."

It is to be conceded that appellant was, under the allegations of the complaint, a mere licensee in the building owned by Brownell, the privilege which it enjoyed in its use and reference to said building was that of being permitted to use the same by Brownell to furnish hot-water heat through Brownell's water-pipes and fixtures in said building, under a contract for hire, made between appellant and the owner of the said building. Under these allegations, appellant controlled the hot-water supply, and through appellant and through Brownell, the occupants of Brownell's building obtained such heat, if they desired it. Brownell's building used the heat, contracted with appellant, and not with Brownell, and Brownell had nothing to do with it, except to permit the pipes and radiators in his building to

be used as the medium through which the heat was furnished, and whether or not the heat was furnished by appellant, and accepted by the tenants, depended wholly on their own arrangement. Under such conditions, it became the duty of appellant, when arrangement was made therefor by any tenant, to turn the heat into the particular room or rooms for which the arrangement was made; and likewise, when a tenant desired the heat turned off, it became appellant's duty to turn it off, and it was not only its duty, but, when the payment for the heat stopped, it was to its interest to have the heat turned off.

It would seem unreasonable to hold that the wrongdoer, under such circumstances, might shield himself, because of his license, from liability for the wrong done. We know that there is a line of cases holding that the mere licensee does not, in the absence of contract to that effect, assume the duties of the licensor, in looking after and keeping up the repairs of the property in connection with which the license is granted, and, therefore, is not liable for injury for a violation of such duties. The foregoing cases, cited and relied upon by appellant, are easily distinguishable from cases like the one presented in this complaint. We have been unable to find any case where the wrongdoer, even though a licensee, so circumstanced and situated with reference to the party injured by his wrong, as was appellant under the facts here pleaded, has been able, by his license, to shield himself from liability to the injured party resulting from his (the licensee's) negligent acts in connection with his own business in the use of the property covered by his license.

We think that it would hardly be contended that if appellant, in turning on the heat to supply the tenants, should, by its carelessness and negligence in such act, permit the escape of the water, to the injury and damage of rightful and legal occupants of the building, it would not be liable therefor.

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For the same reason, appellant would be liable in damage for any injury resulting to such occupants from its carelessness and negligence in shutting off the heat. That this is true, we think is supported by numerous cases of other states, as well as by those of our own State. *Citizens Gas, etc., Co. v. Whipple* (1904), 32 Ind. App. 203; *Huntington Light, etc., Co. v. Beaver* (1905), 37 Ind. App. 4; *Schmeer v. Gaslight Co.* (1895), 147 N. Y. 529, 42 N. E. 202, 30 L. R. A. 653; *McGahan v. Indianapolis Nat. Gas Co.* (1895), 140 Ind. 335, 29 L. R. A. 355, 49 Am. St. 199.

Appellant had in its possession and was selling to the public, an agency that was very dangerous unless properly regulated and controlled, and it owed not only to its
4. patrons in the buildings where it supplied said agency, but to all legal and rightful occupants of such buildings, the duty of using care commensurate with the danger to which it exposed the persons or property of the occupants of such buildings so supplied with such agency. *Ennis v. Gray, supra*; *Clements v. Louisiana Electric Light Co.* (1892), 44 La. Ann. 692, 11 South. 51, 32 Am. St. 348, 16 L. R. A. 43; *Giraudi v. Electric Improvement Co.* (1895), 107 Cal. 120, 40 Pac. 108, 48 Am. St. 114, 28 L. R. A. 596; *Griffin v. United Electric Light Co.* (1895), 164 Mass. 492, 41 N. E. 675, 49 Am. St. 477, 32 L. R. A. 400; *Hebert v. Lake Charles Ice, etc., Co.* (1904), 111 La. 522, 35 South. 731, 100 Am. St. 505, 64 L. R. A. 101.

Counsel for appellant insist that the complaint affirmatively shows that the cutting off of the heat was not the proximate cause of the injury. We cannot agree

3. with this contention. Under the authorities cited, it became appellant's duty, when, in connection with Brownell, it undertook to shut off the heat, to take all reasonable and proper precautions to provide against the then present and known consequences that might result from such act, as well as against such consequences as might reasonably be anticipated to follow therefrom.

In the case of *Derry v. Flintner* (1875), 118 Mass. 131, it is said: "One who commits a tortious act is liable for any injury which is the natural and probable consequence of his misconduct. He is liable not only for those injuries which are caused directly and immediately by his act, but also for such consequential injuries as, according to the common experience of men, are likely to result from his act. And he is not exonerated from liability by the fact that intervening events or agencies contribute to the injury. The true inquiry is whether the injury sustained was such as, according to common experience and the usual course of events, might reasonably be anticipated."

The proximate cause is ascertained by determining the responsible cause, without regard to its time or place in the succession of events that resulted in the injury. *Lake*

5. *Erie, etc., R. Co. v. Charman* (1903), 161 Ind. 95, and authorities cited; *White Sewing Mach. Co. v. Richter* (1891), 2 Ind. App. 331; *Harriman v. Pittsburgh, etc., R. Co.* (1887), 45 Ohio St. 11, 12 N. E. 451, 4 Am. St. 507.

If the original wrongful act or omission supplied the condition by which the subsequent act was rendered

6. hurtful, he who committed that act is responsible.

Walters v. Denver, etc., Light Co. (1898), 12 Colo. App. 145, 54 Pac. 960; *Skin v. Reutter* (1903), 135 Mich. 57, 97 N. W. 152, 63 L. R. A. 743, 100 Am. St. 384.

In turning off said hot-water heat, appellant was chargeable with knowledge of the character of the climate in which it was operating said business, and of the injurious

7. results that might follow the creating of a "dead end" in said pipes filled with water; it knew that on account thereof the water in said pipes was liable to freeze and burst said pipes when freezing weather came, and that in such case damage would, in all probability, result to the occupants of said building.

We think it clear that, under the authorities cited, the allegations of the complaint show that appellant was so situ-

ated with respect to appellees Lenhart and Simpson
3. that it owed them the duty of exercising such care in turning off said hot-water heat that no injury might result to them from such act; that it violated this duty, and that damage resulted to appellees Lenhart and Simpson by reason thereof. In such case, appellant is liable under the law. *Pittsburgh, etc., R. Co. v. Lighthouse* (1904), 163 Ind. 247; *Indianapolis, etc., Transit Co. v. Foreman* (1904), 162 Ind. 85, 102 Am. St. 185; *American Rolling-Mill Co. v. Hullinger* (1904), 161 Ind. 673.

The complaint alleges in positive terms that appellant and Brownell undertook to shut off the hot-water heat, pursuant to the request of certain tenants, and that they did it in the negligent manner before set out. Having undertaken to shut off the heat, under the circumstances and conditions set out in the complaint, it became their duty to use reasonable care and caution in so doing, with reference to the rights of others legally and rightfully occupying the building. *Huntington Light, etc., Co. v. Beaver, supra*; *Conner v. Winton* (1856), 8 Ind. 315, 65 Am. Dec. 761.

Appellant next urges that the court erred in overruling its motion for judgment on the answers to interrogatories, and urges practically the same reasons that are urged

8. against the sufficiency of the complaint, and claims, also, that the answers to the interrogatories show that Miller, who turned off the hot-water heat, in the negligent manner charged, was the agent of Brownell, and not of appellant. What we have said in discussing the complaint on questions here involved need not be repeated. The interrogatories, important and controlling on the subject of Miller's agency, affirmatively find the following facts: That some member, or members, of the firm of Murphy, Redmon & Hammond, in the summer or fall of 1904, notified appellee Brownell that they wanted to discontinue the heat in rooms twelve and thirteen, and requested him to have the water shut off from said rooms. Charles H. Miller was in the em-

ploy of said Brownell during the summer and fall of 1904, and Brownell directed Miller to see Homer Thrush, and if he would tell him how to turn off the water from rooms twelve and thirteen, and drain the pipes, he (Miller) should go ahead and do it. Miller, pursuant to said order from Brownell, saw Thrush, and told him that he would turn off the water from rooms twelve and thirteen, and drain the necessary pipes if he would tell him how to do it. Miller thereupon shut off the water in said rooms, by closing said gate valves, and drained the water from the radiators and pipes in said rooms, and permitted said gate valves to remain closed. If said gate valves in said rooms had been reopened after said radiators had been drained, and the radiator valves closed, there would have been a circulation through said by-pass which would have prevented the water in said belt from freezing. Interrogatory number twenty-four and its answer are as follows: "Did not Thrush tell Miller first to close the main valves, then close the gate valves in said rooms, then disconnect the belt from the main pipes and plug the openings in the main pipes, then reopen said gate valves and open the air valves in said radiators, and drain the water from said belt? A. No."

It will be observed from the answer to interrogatory number twenty-four, that the jury made a negative finding upon the subject of what directions Thrush gave Miller. There is nothing in the answers that negatives the fact that it was the duty of appellant to shut off the water, nothing that negatives Thrush's authority to appoint Miller the agent for appellant, or that negatives the fact that he did so appoint him, in fact or by inference, and give him full directions for turning off the water for appellant, and nothing that negatives the fact that Thrush may have given Miller wrong instructions as to the way in which to shut off the water, all of which facts were provable under the issues. In view of the well-established rules that this court will assume, as proved in favor of the general verdict, every material fact

provable under the issues, not expressly negatived by the answers to the interrogatories, and that a judgment will be rendered on such answers against such verdict only when such answers are in irreconcilable conflict with such verdict, we are of the opinion that no error was committed by overruling this motion. *Shoner v. Pennsylvania Co.* (1892), 130 Ind. 170; *Chicago, etc., R. Co. v. Leachman* (1903), 161 Ind. 512; *Louisville, etc., R. Co. v. Summers* (1892), 131 Ind. 241; *McCoy v. Kokomo R., etc., Co.* (1902), 158 Ind. 662; *Consolidated Stone Co. v. Summit* (1899), 152 Ind. 297.

The third error relied on is the overruling of the motion for a new trial, and the first ground of the motion insisted on is an alleged error of the court in overruling the
9. objection of appellant to the following question put by his codefendant Brownell to said plaintiff's witness, Miller, on cross-examination: "What did you understand to be Brownell's purpose in referring you to Thrush to have the heat turned off, instead of turning it off yourself?" Counsel followed up the objection to this question by a motion to strike out the answer thereto, which was also overruled, and exception saved, and this alleged error is assigned as a ground of the motion for new trial. The question was objectionable, and the objection thereto should have been sustained; but the answer was not responsive, being practically a repetition of what the witness had stated, both in his examination-in-chief and on cross-examination, was his understanding of what Brownell had said to him, and for this reason it was harmless.

A number of instructions were given by the court, at the request of each of the appellees, and many of them are objected to by appellant. We have examined all the instructions given, and are of the opinion that they correctly state the law applicable to the case and with fairness to appellant.

Appellant urges that the verdict is not sustained by suf-

ficient evidence, and earnestly insists that the evidence shows that Miller, who turned off the hot-water heat, was the agent of Brownell, and not of appellant, and that, therefore, appellant had nothing to do therewith.

As will later develop in this opinion, there is a double appeal in this case, and we shall set out enough of the evidence on the disputed points to present the question of its sufficiency to sustain the verdict in favor of both the appellees to the original appeal.

Witness Miller testified as follows: "Mr. Brownell informed me * * * that his tenants, Murphy, Redmon & Hammond, did not want the hot water in the rooms * * * vacated by Mr. Kling, and told me to go to Mr. Thrush, and tell him they did not want this heat any longer, and further to state to him that if he would instruct me how to turn off this water, and drain the necessary pipes, that I should go ahead and do it. I went to see Thrush, and said to him, that Mr. Brownell had instructed me to tell him that his tenants, Murphy, Redmon & Hammond did not want this heat in the rooms that they had recently rented, and that he had instructed me to tell him that I could turn the water off and drain the necessary pipes if he would instruct me how to do it. * * * He [Thrush] said, turn the valves off in the basement on this branch to turn the water off. * * * I replied that I did not think there were such valves there. * * * He said, There isn't? Well, there ought to be. Then I told him that there were valves on the second floor in these rooms, near where the risers came through the floor. * * * I roughly drew a sketch indicating the location of these particular valves, and every union in these two rooms. * * * He said to close these two valves and disconnect the union and drain the pipes and radiators. * * * I suggested that he had better step over to the building and show me there. He said he did not think it was necessary, that I could have no trouble there, and then I left him."

Witness George Redmon testified that he was in the rooms where the pipes burst, just after the accident, and saw Miller and Thrush there, and heard a conversation between them. Thrush accused Miller of shutting off the wrong valve, and Miller said that he went according to the instructions that he had given him. Thrush said the shutting off of that valve caused the water to freeze, and burst the pipe.

Appellee Lenhart testified as follows: "Mr. Thrush told Miller he had shut off the wrong valve, and created a 'dead end,' and it froze, and Miller said: 'I did just exactly as you told me.'"

Murphy testified that Thrush said to Miller, that if he had shut off the water at the place where he told him to, it would not have frozen, and Miller replied, in substance, that he had shut it off where he was told to shut it off.

Brownell testified as follows: "A. I sent for Miller. * * * The substance of what I said to him was that Murphy, Redmon & Hammond did not want the hot-water heat in this office any longer, and wanted it cut off. I instructed him to go to the heating company, and arrange to have it done. Q. What, if any, instructions did you give Miller himself to cut off the hot water? A. None. * * * I understand * * * that I had given the hot water people license to go into the building and sell heat to my tenants. * * * The heating company tried to make a contract with me, but I refused to make one. * * * I did not have any contract with the heating company. * * * Q. The heating company had been given the right to sell heat in there? A. I made the contract with them for putting in the plant, and had an understanding with Richard Edwards that they would go in there and sell heat to my tenants. Edwards tried to get me to make a contract by which I would assume the heating of the building for all my tenants, but I refused to do that, and told him they could go in there and sell heat to my tenants and collect for it." (Edwards was the president of the heating company.)

Thrush, superintendent of the heating company, testified that the former occupant of rooms twelve and thirteen of the Brownell building had paid him heat rent, and that on January 18, 1904, he collected from Murphy, Redmon & Hammond, the heat rent up to the close of the heating season of 1903 and 1904, and at that time said renters notified him that they would not want the heat after the close of that season; that he understood he was under obligation to turn off the heat when ordered by the tenant to do so; that if a tenant informed him he did not want the heat, it was his duty to have it turned off, and to see that it was done properly.

There were over seven hundred pages of evidence, but we think we have indicated enough of it upon the disputed matters to show that there was some evidence tending to support the verdict against appellant, which, under the rules of this court, is enough to prevent the granting of a new trial on account of the insufficiency thereof.

We find no error in the record against appellant. There is, however, another side to this appeal. After appellant filed its transcript and perfected its appeal herein, appellees Lenhart and Simpson filed petition for leave to assign errors on appellant's transcript, which was granted by this court.

The errors assigned and relied on by said appellees call in question the rulings of the court on their motions for judgment against Brownell on the answers to interrogatories, and for a new trial as against Brownell.

As to the first motion, counsel for Brownell insist that there could have been no judgment against him on the answers to the interrogatories, for the reason that there was no finding by these answers as to any amount of damage sustained by said appellees, and, as supporting this contention, cite the case of *Sievers v. Peters, etc., Lumber Co.* (1898), 151 Ind. 642.

The case cited is entirely different from this one, and not

in point on the question here presented. In the case cited there was but one defendant, and a general verdict against the plaintiff with answers to interrogatories, none of which found any amount of damages, and the court in that case properly held that there were no "facts found from which the court could, as a matter of law, make such assessment."

In this case, the theory of the complaint is that both defendants are joint tort feasons. Under this theory of the complaint, and the proof as well, if either or both defendants were liable at all they were liable for the entire damages suffered by plaintiffs Lenhart and Simpson. *Baltes v. Bass, etc., Mach. Works* (1891), 129 Ind. 185, 188; *Ashcraft v. Knoblock* (1896), 146 Ind. 169; *Doherty v. Holliday* (1893), 137 Ind. 282; *Boor v. Lowrey* (1885), 103 Ind. 468, 476, 53 Am. Rep. 519; *Everroad v. Gabbert* (1882), 83 Ind. 489.

There was in this case a general verdict against one of the defendants, which fixed the amount of the recovery.

In determining a motion for judgment on the answers to interrogatories, it is the duty of the court to consider, in connection therewith, the general verdict and the
12. pleadings. In this case the jury, by its general verdict, found facts from which "the court can, as a matter of law, make such assessment."

We have found a more difficult question in the disposition of this motion upon its merits; but a careful consideration leads us to the conclusion that, under the general denial to the complaint, appellee Brownell might have made proof of other facts not negatived by these answers, which would have relieved him from liability, and that the motion was, therefore, properly overruled.

Lastly, it is urged by Lenhart and Simpson that the verdict in favor of Brownell was not sustained by sufficient evidence. Brownell insists that, for the purposes of
13. the appeal of Lenhart and Simpson, the evidence is not in the record; that the bill of exceptions filed in

the court below, and made a part of the record of this appeal, was not filed by Lenhart and Simpson, and was not filed within the time given them to file such bill of exceptions, and, therefore, should not be considered in determining any question on the evidence raised by their appeal. The facts with reference to the filing of the bill of exceptions are as Brownell claims; but there is a general bill of exceptions containing the evidence that was filed by appellant within the time given it to file such bill, and this bill may be considered in determining any question in relation thereto properly presented by either the original appellant or these appellants. After notice to, and with the consent of, appellant heating company, these appellants were by this court permitted to assign error on the transcript of the original appellant. This obviated the necessity for their filing a separate transcript, and also the necessity for a second bill of exceptions. To hold that in such cases a second bill of exceptions should be filed would add unnecessarily to the record and augment the costs of appeal, with no resulting benefit to any one. This view of this question can do no injustice to any of the parties to an appeal, and enables the court finally to adjudicate the whole controversy without a multiplicity of transcripts and bills of exceptions, with the additional costs thereby occasioned.

We have been cited to no decision of this court or the Supreme Court decisive of this exact question, but we are strongly supported in our holding by the cases of *Feder v. Field* (1888), 117 Ind. 386, and *Merritt v. Richey* (1891), 127 Ind. 400, 402.

The sufficiency of the evidence to sustain the verdict in favor of Brownell presents the most difficult question raised by this appeal. In support of their respective contentions as to the sufficiency of the evidence, Brownell and the heating company are both insisting on the application of the same rule of law, and each hopes thereby

to shift the liability. The heating company contends that the proof shows that their superintendent—Thrush—in giving directions to Miller as to how to shut off the water, “was acting in the service of Brownell; and Brownell is insisting that his employe Miller was loaned to the heating company to shut off the water, under the instructions and directions of its general superintendent Thrush.” In determining this question, the law requires this court to look only to the evidence that tends to support the verdict, and to indulge all legitimate inferences that may be drawn therefrom in favor of such verdict. This being the rule by which this court is bound, we are led to inquire what facts and legitimate inferences most favorable to Brownell can be drawn from the evidence in this case.

From the evidence heretofore quoted, we think the jury may have properly found that the duty of shutting off the water from rooms twelve and thirteen rested upon the heating company and not upon Brownell; that the heating company accepted Miller as their agent, authorized him to shut off said water, and gave him directions how to do the work, which directions were wrong, and resulted in shutting off the water in the negligent manner charged in the complaint.

There being some evidence which tended to prove such facts and inferences, we are, under the rules governing this court, constrained to hold that as to Brownell the verdict of the jury was sustained by sufficient evidence. We find no error in the record.

Judgment affirmed.

REEVES & CO. v. MILLER ET AL.

[No. 7,001. Filed June 30, 1911.]

1. **BILLS AND NOTES.—Discharge.—Agency.—How Alleged.**—In a suit on notes and to foreclose a mortgage securing them, an answer that “the duly authorized agent of said plaintiff came to the defendants, and * * * agreed and contracted to take the machinery set out in the plaintiff’s mortgage and his complaint herein, in full payment * * * of the debt herein sued on, and * * * that in compliance with said contract said defendants surrendered” such property to such agent, is insufficient, since it fails to show that such agent was authorized to make such a settlement. p. 340.
2. **BILLS AND NOTES.—Discharge.—Agency.—Ratification.—Allegations of.**—In a suit on notes and to foreclose a mortgage securing them, an answer alleging that plaintiff’s duly authorized agent agreed to accept the property, for which the notes were given, in discharge thereof, and that the property was surrendered to and accepted by him, the answer further alleging that “the plaintiff has been in full and complete possession and control of said property ever since it was * * * surrendered as above set out,” is bad on the theory of ratification, since it fails to show that the plaintiff knew of the conditions of such surrender and possession, the mortgage giving to plaintiff the right of possession in case of a default in payment. p. 342.
3. **PLEADING.—Answer.—Theory.**—A paragraph of answer must proceed upon some definite theory apparent from the general scope and character thereof; and upon such theory it must stand or fall. p. 344.

From Washington Circuit Court; *Thomas B. Buskirk*, Judge.

Suit by Reeves & Co. against Noble Miller and another. From a judgment for defendants, plaintiff appeals. *Reversed.*

W. R. Baxter, Walter Olds and Elliott & Houston, for appellant.

M. B. Hottel, W. W. Hottel and F. P. Cauble, for appellees.

LAIRY, C. J.—On August 27, 1906, appellant entered into a written contract with appellees, whereby it sold to appel-

lees a sawmill for \$2,625. The contract specifically described the property sold, and provided that appellees should give six notes, of \$437.50 each, for the purchase price. It was also stipulated in the contract that the title to the machinery sold should not pass to the appellees, but should remain in the seller until the purchase price was fully paid. It further provided that the seller should have a right to retake possession of the property, in the event it should not be paid for in accordance with the terms of the contract. The contract also contained a warranty of the machinery sold.

On September 1, 1906, appellees executed the notes provided for in the contract, and also executed a chattel mortgage on the machinery purchased, to secure the payment of these notes, which mortgage was duly recorded. The notes were not paid at maturity, and this suit was begun by appellant to collect the notes and to foreclose the mortgage. The complaint was based on the notes and mortgage, and no question as to their sufficiency is raised. The defendant filed an answer in four paragraphs, and as no objection is urged against the sufficiency of any of the paragraphs of answer except the fourth, we omit further reference to the first three. A demurrer for want of facts sufficient to constitute a cause of defense was filed to the fourth paragraph of answer and overruled. This ruling of the court is the first cause relied on for reversal.

The fourth paragraph of answer sets up a contract between appellees and J. H. Holbrook, who was alleged to be the duly authorized agent of appellant, by the terms

1. of which, said machinery was turned over to said agent, on his agreement to release the mortgage and surrender the notes given for the purchase price of said machinery. Appellant insists that the answer is insufficient, for the reason that it does not aver that said Holbrook was acting for and in behalf of appellant in making said contract, and that the answer nowhere alleges that appellant made such contract. The averments of the answer, so far

as they relate to the question presented, are as follows: That on the — day of —, 190—, and long before the bringing of this suit, J. H. Holbrook, the duly authorized agent of said plaintiff, came to defendants, and by the express agreement and contract entered into by and between said plaintiff's agent and the defendants herein, agreed to take the machinery described in plaintiff's mortgage, in full payment and satisfaction of the debt herein sued on, and to surrender to the defendants said notes, and to release the mortgage securing them; that, in compliance with said contract, said defendants surrendered to plaintiff's said agent the ownership, possession and control of said machinery, and plaintiff's said agent took complete possession and control thereof, asserted ownership, and advertised it for sale, and on the day advertised for said sale to be made, neither said plaintiff nor its said agent came and made sale thereof.

It will be seen that the portion of this paragraph before set out describes Holbrook as the duly authorized agent of appellant, and alleges that the contract therein set out was made with him, and the property turned over to him. These facts may all be true as averred, and still appellant may not be bound by the contract. Holbrook may have been the duly authorized agent of Reeves & Co. at the time he made the contract, but he may not have been acting in its behalf in making it. The answer should have averred that the contract was made with appellant, or that it was made with appellant by and through its agent, Holbrook, who was by appellant duly authorized in that behalf. Some other form of averment might be held sufficient, but whatever form is adopted should show that the agent had authority from the principal to make the contract, and that he acted in its behalf in making it. 16 Ency. Pl. and Pr. 900; *Codding v. Inhabitants of Mansfield* (1856), 7 Gray 272; *First Nat. Bank v. Turner* (1893), 24 N. Y. Supp. 793; *May v. Kelly & Frazier* (1855), 27 Ala. 497.

Appellees contend that this defect in the answer is cured

the following averment: "Defendants further say that neither collectively nor individually have they ever
2. been in possession or control of said property since it was surrendered and turned over to plaintiff's said agent in full payment of said notes and mortgage, but that plaintiff has been in full and complete possession and control of said property ever since it was turned over and surrendered to it, as before set out."

The latter part of this quotation when considered in connection with the part first quoted, amounts to an averment that appellees turned the property over to Holbrook under the contract entered into with him, and that ever since that time said property has been in the possession of appellant, Reeves & Co. It cannot be doubted, that if Holbrook, assuming to act for Reeves & Co., entered into the contract with appellees, as set out in this paragraph of answer, and took possession of the machinery by virtue of such contract, and thereafter turned it over to appellant, who, knowing the material facts, accepted and retained possession of said property, then said appellant would be bound by said contract, on the ground that it had ratified the act of Holbrook. *See* *Wheeler v. Munson* (1876), 53 Ind. 138; Story, Agency (8th ed.) §§251-254; *Wilson v. Dame* (1878), 58 N. H. 392; *Rowder v. Reed* (1881), 80 Ind. 1. Under such circumstances, it would not be necessary to aver or prove that Holbrook had authority from appellant to make the contract at the time it was entered into.

Even though it were proper to consider this paragraph of answer upon the theory of ratification, it fails to state facts sufficient to make it good on such theory. It fails to aver that the possession of said property, ever since it was turned over to the agent, Holbrook, as averred, was taken by appellant, with knowledge on its part of the arrangement by which possession had been obtained from appellees. Even though it be true, as alleged, that appellant has been in possession of said property ever since it was turned over to its

agent Holbrook, this fact would not bind appellant to the terms of a contract of which it had no knowledge. If appellant knew that Holbrook had gained possession of said property by means of some contract, it would probably be incumbent upon it to ascertain the terms of such contract; but if it believed that the possession had been taken by virtue of the terms of the chattel mortgage that it held, then the mere fact that it received and held full and complete control of the property could not be construed as a ratification of any contract made by Holbrook, of which appellant had no knowledge. *Willison v. McKain* (1895), 12 Ind. App. 78; *Davis v. Talbot* (1894), 137 Ind. 235; *Kelley v. Newburyport, etc., Horse R. Co.* (1886), 141 Mass. 496, 6 N. E. 745; Mechem, Agency §148.

In the case of *Willison v. McKain, supra*, the court states the rule as follows: "If the principal knowingly appropriates to himself the fruits of his agent's unauthorized act he cannot be heard to declare that it was done without his authority. Neither can he take the benefits and reject the burdens: he must as a rule accept or reject the whole contract. But here, as in other cases, it is indispensable that the principal should have had full knowledge of the material facts, or that he should have intentionally accepted the benefits without inquiry. Otherwise the receipt and retention of the benefits of the unauthorized act cannot be deemed a ratification of it." The Supreme Court of this State, in the case of *Davis v. Talbot, supra*, said: "No other act of ratification appears, unless it can be said that the acceptance and retention of the money of the solvent debtors could be properly so considered, but before such acts can be held a ratification it must appear that the acceptance or retention was with knowledge of the agreement so in excess of the agent's authority."

This paragraph of answer is clearly insufficient upon either theory upon which it may be considered. It is quite apparent, however, from the general scope of this answer,

that it proceeds upon the theory that the agent, Holbrook, had authority from Reeves & Co. to make said contract at the time it was made, and that he made it in behalf of said company; and that it does not proceed on the theory of a subsequent ratification of an unauthorized act of the agent. The proceedings at the trial, as disclosed by the record and the finding of the trial court, show that it was so construed by that court. If it were held good upon the latter theory, the evidence would not sustain it upon such theory.

3. A pleading must proceed upon some single definite theory, which must be determined by its general scope and character; and upon this theory it must stand or fall. *First Nat. Bank v. Root* (1886), 107 Ind. 224; *Aetna Powder Co. v. Hildebrand* (1894), 137 Ind. 462, 45 Am. St. 194; *Oolitic Stone Co. v. Ridge* (1908), 169 Ind. 639; *Dyer v. Woods* (1906), 166 Ind. 44; *Carmel Nat. Gas, etc., Co. v. Small* (1898), 150 Ind. 427.

As the fourth paragraph of answer was clearly insufficient upon any theory, the demurrer thereto should have been sustained.

The judgment is reversed, with directions to sustain the demurrer to the fourth paragraph of defendant's answer, with leave to amend.

Hottel, J., did not participate.

PERLEY v. SCHMIDT CUT STONE COMPANY.

[No. 7,135. Filed June 30, 1911.]

1. PLEADING.—*Motions.*—*Ventre de Novo.*—Where separate verdicts are returned in a joint and several action for tort against two or more defendants, a motion for a *venire de novo* is the proper remedy. p. 346.
2. PLEADING.—*Motions.*—*Ventre de Novo.*—*Essentials.*—*Appeal.*—To present any question on appeal, on a motion for a *venire de novo*, the record must disclose the grounds upon which such motion was based. p. 347.
3. NEW TRIAL.—*Grounds.*—*Receiving Separate Verdicts against Joint and Several Defendants.*—In a joint and several action of

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tort against two or more defendants, the receiving of separate verdicts against such defendants does not constitute ground for a new trial. p. 347.

4. *APPEAL.—Presumptions.—Separate Verdicts on Joint and Several Complaint.*—In a joint and several action for tort, a defendant cannot successfully complain, on appeal, that a joint verdict should have been required, the presumption being, in such case, that the separate verdict was returned on the separate allegations against him. p. 348.
5. *APPEAL.—Parties.—Causes.—Misjoinder.—Failure to Move to Separate Causes.*—A failure of a defendant, against whom and others a joint and several complaint for tort is filed, to move to separate the causes, waives any question as to the propriety of the trial court's receiving separate verdicts at the trial. p. 348.

From Saint Joseph Superior Court; *Vernon W. VanFleet*, Judge.

Action by the Schmidt Cut Stone Company against Samuel S. Perley and others. From a judgment for plaintiff, defendant Samuel S. Perley appeals. *Affirmed.*

P. J. Houlihan and *Anderson, Parker & Crabill*, for appellant.

Charles A. Davey, for appellee.

HOTTEL, J.—Action brought by Schmidt Cut Stone Company against Samuel S. Perley, V. P. Fancil, Meyer Gilbert and Abe Barris, partners, and Meyer Gilbert, to recover damages for breaking, mutilating, destroying and carrying away and unlawfully converting to their own use certain personal property belonging to appellee.

The amended complaint is in five paragraphs, the first of which charges all the defendants jointly with unlawfully destroying and converting the property mentioned in the complaint; the second charges appellant with said unlawful acts; the third charges V. P. Fancil with said acts; the fourth charges Meyer Gilbert with said acts, and the fifth charges Meyer Gilbert and Abe Barris, doing business under the firm name and style of South Bend Iron and Metal Company, with said unlawful acts. To this complaint appellant

filed a separate demurrer to each paragraph, which was sustained by the court as to the third, fourth and fifth paragraphs, and overruled as to the first and second paragraphs. The cause was put at issue by a general denial filed by each defendant. A trial by jury resulted in three separate verdicts, viz.: A verdict for plaintiff against defendant Samuel S. Perley for \$400; against Meyer Gilbert for \$25, and against Victor P. Fancil for \$25. Upon the return of said separate verdicts, appellant objected to the court's receiving them, and moved that the court require the jury to return one general verdict. The motion was overruled and an exception saved. Appellant also moved for a *venire de novo*, and the motion was overruled and exceptions saved. The court then rendered judgment on said several verdicts, and appellant filed a motion for a new trial, which was overruled and exceptions saved.

The errors relied on for reversal are that the court erred in overruling appellant's motions for a *venire de novo* and for a new trial. The grounds relied on for a new trial are as follows: "(a) The court erred in receiving the separate and several verdicts against defendants Perley, Fancil and Gilbert, over the objection then made by the defendant. (b) The court erred in overruling this defendant's motion to require the jury to return one verdict against all the defendants found liable for the conversion complained of in the complaint, and in discharging the jury without requiring it to return its single verdict against all the defendants found liable."

The only question attempted to be presented by these assigned errors is the ruling of the court in accepting three separate verdicts, and in rendering judgment thereon.

1. It seems that a motion for a *venire de novo* is the proper way to raise this question. See Elliott, App. Proc. §§327, 343, 761; *Everroad v. Gabbert* (1882), 83 Ind. 489, 492; *Ashcraft v. Knoblock* (1896), 146 Ind. 169, 175; *Boor v. Lowrey* (1885), 103 Ind. 468, 477, 53 Am. Rep. 519.

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Counsel for appellee insists that in this case the question is not presented by this motion, for the reason that the record does not disclose the ground upon which the motion
2. was made, and that this was necessary in order to obtain a consideration thereof by this court. This contention is supported by the authorities. *Douglas v. Indianapolis, etc., Traction Co.* (1906), 37 Ind. App. 332; *Deatty v. Shirley* (1882), 83 Ind. 218; Elliott, App. Proc. §763.

In the case of *Douglas v. Indianapolis, etc., Traction Co., supra*, this court said: "The record must disclose the ground upon which it [the motion for a *venire de novo*] was based and pointed out to the trial court. This it does not do. The action of the trial court in overruling the motion is here for review. There one reason may have been assigned as a basis for the motion, and here another. The presumption is that the trial court correctly ruled upon the question as it was then presented, and the record being silent as to any reason urged in that court as a cause for granting the motion, the question on appeal will be deemed to have been correctly decided by it."

The record in this case does not disclose the ground upon which this motion was made, and, therefore, under the authorities cited, presents no question for the consideration of this court.

Counsel next attempt to present this question by the error assigned in overruling the motion for a new trial, as indicated by reasons "(a)" and "(b)," before
3. quoted. We are of the opinion that this question is not properly presented by reasons for a new trial; but if it be conceded that the question is presented by such motion, yet appellant is in no position to complain of the ruling.

The cases cited are not applicable to this case, because the complaints stated joint causes of action against all the defendants, and there were separate verdicts against two or

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more sets of defendants. This is not a case where a
4. single paragraph of complaint charges appellant and his codefendants jointly with the wrongful and unlawful conversion and destruction of property, and seeks to recover against such defendants jointly. There were two paragraphs of complaint held good as against appellant's demurrer; one charged him jointly with his codefendants with said unlawful destruction and conversion of said property, and the other charged him alone with such unlawful conversion and destruction of said property. To these paragraphs, after submitting a demurrer for want of facts, appellant filed a general denial, and went to trial with his codefendants without objection, and without a motion of any kind to have the cases docketed separately or tried as separate causes. In such a case, this court will, in the absence of the evidence or some finding of the court to the contrary, indulge the presumption that the verdict returned was upon the paragraph of complaint stating a cause of action against appellant alone, and that appellant has not been harmed by such verdict.

All reasonable presumptions and intendments are indulged in favor of the general verdict. This being true, this court will, where there are two or more paragraphs of complaint, and nothing to show to the contrary, indulge the presumption that a verdict for the plaintiff is based on that paragraph of complaint to which it is germane. *Central Union Tel. Co. v. Fehring* (1896), 146 Ind. 189; *Shaw v. Barnhart* (1861), 17 Ind. 183.

By joining issue and going to trial, without objecting to such misjoinder of causes and parties, appellant is now in no position to raise the question which he here attempts

5. to raise. §348 Burns 1908, §343 R. S. 1881; *Lane v. State, ex rel.* (1866), 27 Ind. 108, 112; *Boonville Nat. Bank v. Blakey* (1906), 166 Ind. 427; *Cargar v. Fee* (1895), 140 Ind. 572, 576.

Judgment affirmed.

CHICAGO, INDIANAPOLIS AND LOUISVILLE RAIL-
WAY COMPANY v. NEWKIRK.

[No. 6,748. Filed February 3, 1911. Rehearing denied June 30, 1911.]

1. APPEAL.—*Briefs.*—*Waiver.*—*Dismissal.*—Where appellant's brief fails to show how the issues in a case were decided, what the judgment was, what were the alleged errors, and separately-numbered points, and authorities to support them, no question is presented; and the appeal should be dismissed. pp. 349, 350.
2. APPEAL.—*Briefs.*—*Requisites.*—Briefs should be so prepared that all questions presented by the assignments of errors can be determined without examining the record. p. 350.
3. APPEAL.—*Rules.*—*Courts.*—The rules of the courts on appeal should be uniformly enforced. p. 350.

From Lawrence Circuit Court; *S. B. Lowe*, Special Judge.

Action by James Newkirk against the Chicago, Indianapolis and Louisville Railway Company. From a judgment on a verdict for plaintiff for \$350, defendant appeals. *Appeal dismissed.*

E. C. Field, H. R. Kurrie, Brooks & Brooks and *J. E. Henley*, for appellant.

Rufus H. East and *John F. Regester*, for appellee.

PER CURIAM.—This is an appeal from a judgment rendered by the Lawrence Circuit Court. Appellee asks that the appeal be dismissed, because under rule twenty-two of this court, the brief filed by appellant is insufficient to raise any question for decision.

The brief filed by the appellant fails in several particulars to comply with rule twenty-two. It does not state how the issues were decided, what the judgment or decree was,
1. or the errors relied on for reversal; nor does it give under a separate heading of each error relied on, separately numbered propositions or points, stated concisely and without argument or elaboration, together with the authorities relied on in support thereof.

COURT OF INDIANA,

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at a brief which fails in these rules, raises no question for decision in such cases should be dismissed (1905), 35 Ind. App. 176.

Supreme Court of this State that decided that all the questions presentment of error can be determined by an examination thereof, without record. *American Food Co. v. Hall* 33; *Chicago, etc., R. Co. v. Wysor* 1. 288; *M. S. Huey Co. v. Johnston Albaugh Bros., etc., Co. v. Lynas Hall v. McDonald* (1908), 171 Ind.

Walton (1905), 165 Ind. 253.

would be required to refer to the errors are relied on for reversal. present in the brief as to the errors assignment of error is not copied the propositions and authorities are state headings of each error relied by no way to determine the errors to the record, except as they can present or other parts of the brief.

It cannot be enforced in one case

They should either be uniformly or simply ignored, so that the profession has certainty as to the position of the

case is dismissed, at the cost of ap-

HINSHAW, ADMINISTRATOR, v. SECURITY TRUST COMPANY, EXECUTOR.

[No. 7,504. Filed January 12, 1911. Rehearing denied and opinion modified May 12, 1911. Transfer denied June 30, 1911.]

1. EXECUTORS AND ADMINISTRATORS.—*Claims.—Sufficiency.—Bills and Notes.*—A claim against an estate, setting out the fact that decedent owed the claimant two notes for certain amounts, that such notes were secured by certain stock, that certain amounts of interest were endorsed on the backs thereof as paid, but failing to set out such notes or copies thereof as exhibits, is sufficient, when attacked for the first time on appeal, the facts stated being sufficient to bar another action therefor, it appearing in the record that two admittedly genuine notes corresponding in dates and amounts to those described were introduced in evidence without objection. p. 354.
2. APPEAL.—*Briefs.—Waiver.*—Points not discussed are waived. p. 355.
3. LIMITATION OF ACTIONS.—*Bills and Notes.*—Notes that appear upon their face to have been due more than ten years preceding the filing of an action thereon are *prima facie* barred by the statute of limitations. p. 355.
4. BILLS AND NOTES. — *Indorsements. — Evidence.* — Under §303 Burns 1908, §301 R. S. 1881, providing that “no acknowledgment or promise shall be evidence of a new or continuing contract * * * unless * * * contained in some writing signed by the party to be charged thereby,” and §305 Burns 1908, §303 R. S. 1881, providing that “no indorsement * * * of any payment made upon any instrument of writing, by or on behalf of the party to whom the payment shall purport to be made, shall be deemed sufficient to exempt the case from the provisions of this act,” evidence of indorsements showing the payment of interest made by the payee of notes is not sufficient to take such notes out of the operation of the statute of limitations. p. 355.
5. EVIDENCE.—*Shop-Books.—Accounts.—Appeal.*—Original entries in an account book of the payment of interest on notes, made by a deceased payee, are admissible in evidence; and a failure of the court to consider such evidence constitutes reversible error. p. 356.
6. APPEAL.—*Transcript.—Judge's Opinion.—Inclusion of.—Effect.*—There being no statute requiring a trial judge to give a written opinion on the decision of a case, such opinion though included in the transcript cannot be considered on appeal for any purpose. p. 356.

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7. TRIAL.—*Special Findings.*—*Request.*—*Appeal.*—A special finding made without a request therefor, will be treated on appeal merely as a general finding. p. 357.
8. APPEAL.—*Consideration of Evidence.*—*Presumptions.*—On appeal, it will be presumed that the trial court considered all the evidence admitted, the burden of showing otherwise being upon the party complaining thereof. p. 357.
9. BILLS AND NOTES.—*Evidence.*—*Statute of Limitations.*—*Advancements.*—In a claim by the personal representative of the deceased payee of notes against the personal representative of the deceased maker thereof, upon such notes, the defenses being the statute of limitations and that the notes merely evidenced an advancement from the payee who was the maker's mother, uncontradicted evidence of the payment of interest thereon within ten years preceding the filing of the action thereon does not require a reversal of judgment for defendant, where there was evidence from which it could properly be found that such notes constituted an advancement. p. 357.
10. EVIDENCE.—*Shop-Book Entries.*—*Memoranda.*—*Notes.*—In an action upon notes, evidence of mere memoranda made by the deceased payee, not a part of any original account book, is not admissible in favor of her estate, constituting mere self-serving declarations. p. 358.
11. TRIAL.—*Exclusion of Evidence.*—*When Harmless.*—The exclusion of evidence upon an issue is harmless where such issue was found in the complaining party's favor. p. 359.

From Probate Court of Marion County (8,956); *Frank B. Ross*, Judge.

Action by Benjamin E. Hinshaw, as administrator *de bonis non*, with the will annexed, of the estate of Eliza J. Gray, deceased, against the Security Trust Company, as executor of the last will of Pierre Gray, deceased. From a judgment for the defendant, plaintiff appeals. *Affirmed.*

Morton S. Hawkins, Frank B. Jacqua and *Clarence R. Martin*, for appellant.

William L. Taylor, Louis B. Ewbank and *John W. Kern*, for appellee.

LAIRY, J.—This is an appeal from a judgment of the Probate Court of Marion County, founded on a claim filed by appellant against appellee. Appellee is the executor of the

last will and testament of Pierre Gray, and appellant is the administrator *de bonis non* of the estate of Eliza J. Gray, who was the mother of Pierre Gray. The claim filed in favor of the mother's estate was based on two notes, one for \$3,000 and one for \$1,000, and was in the words and figures as follows: "Estate of Pierre Gray, deceased, to estate of Eliza J. Gray, two notes payable to Eliza J. Gray, for \$1,000 and \$3,000, respectively, dated April 5, 1897, six per cent interest after date, due one day after date, payable at the Indiana National Bank, of Indianapolis, Indiana." The following notation was on the face of the first note: "Collateral Stock Certificate No. 94, ten shares, First National Bank, Noblesville, Indiana." On the last note was the following: "Collateral Stock Certificate No. 93, fifty shares, First National Bank, Noblesville, Indiana." Three indorsements were on the backs of the notes: "Interest paid on December 24, 1897." "Interest paid on June 24, 1898." "April 24, 1908. Principal and interest due, nine years and four months, \$6,240." The claim was properly verified.

To this claim, in addition to the answer that the law puts in, appellee filed an answer in set-off, alleging, in substance, that the estate of Eliza J. Gray, at the time of her death, was indebted to Pierre Gray in the sum of \$6,240; that on February 14, 1905, and from that time until the death of Pierre Gray, on December 25, 1907, Eliza J. Gray, Pierre Gray and Bayard Gray were the equal owners in fee simple of a residence property on North Pennsylvania street, in Indianapolis, Indiana, and that Eliza J. Gray resided therein with Pierre Gray and his wife; that a contract was entered into whereby Eliza J. Gray, Pierre Gray and Bayard Gray each was to pay one-third of the expenses of maintaining the property; that after said contract was entered into, Eliza J. Gray continued to live in the residence property, and that all the expenses heretofore referred to were paid by Pierre Gray, amounting in the aggregate to about \$2,955; that Eliza

J. Gray never paid the one-third part of said expenses, in accordance with the agreement, and at the time of her death she was indebted in the sum of one-third of the aggregate of said expenses, which appellee asked to have set off against the claim filed by the administrator of the estate of Eliza J. Gray.

The cause was submitted to the court without the intervention of a jury, the evidence was heard, and a general finding rendered against the claimant, and also against appellee on the set-off. A motion for a new trial was filed by the claimant, which was overruled, and judgment was entered in the court below against the estate of Eliza J. Gray on the claim filed by the administrator of her estate, and also against the estate of Pierre Gray on the set-off filed by his executor. From this judgment, the administrator of the estate of Eliza J. Gray appealed to this court.

Appellee has assigned a cross-error, in which he alleges that the claim filed in the court below does not state facts sufficient to constitute a cause of action. The ques-

1. tion presented on the cross-error will be considered first, for the reason that if the claim filed is insufficient to sustain a judgment in favor of appellant, the judgment below in favor of appellee must be sustained, regardless of any other question presented. There was no demurrer to the claim filed in the court below, its sufficiency being challenged for the first time by assignment of error in this court. Had the claim been challenged by demurrer, there might have been serious doubts as to its sufficiency, for the reason that no copies of the notes upon which the claim is based are set out in the claim, or filed with it as an exhibit; nor does the claim show affirmatively that said notes were signed by Pierre Gray. The claim, however, is sufficient when attacked for the first time in this court. It appears that two notes signed by Pierre Gray, and corresponding in dates and amounts to those described in said claim, were introduced in evidence at the trial. No objection was made by appellee to

the introduction of this evidence, and the signatures of Pierre Gray to those notes were admitted. It has been decided repeatedly that if the facts stated in a complaint are such that a judgment thereon would bar another action for the same cause, such complaint will be held sufficient when first attacked on appeal.

The only error relied on for reversal is the overruling of the motion for a new trial. This motion is very voluminous,

covering fifty pages of the record. In determining,

2. therefore, what rulings of the lower court are relied on for reversal, this court will consider only such questions arising on the motion for a new trial as have been presented and discussed by appellant in his brief. All other questions will be considered as waived.

Before considering any of the questions presented, it is well to state concisely what points were in issue at the trial. Under the issues as formed, any evidence could have been offered that would tend to defeat the claim on any ground, or to prove the set-off pleaded. The evidence, however, was directed to only three questions of fact, namely, the statute of limitations, the question of advancement, and the facts pleaded by way of set-off.

The notes described in the claim and introduced in evidence were due, as disclosed by the notes themselves, more than ten years before the date on which said claim

3. was filed. The notes were, therefore, *prima facie* barred by the statute, but appellant sought to prove that interest had been paid by Pierre Gray on both of said notes within the period of the statute of limitations.

The first question presented by appellant is the alleged failure of the court below to consider certain evidence admitted at the trial. As tending to prove payments on

4. the notes within the period of the statute of limitations, appellant introduced in evidence certain indorsements on the back of each of the notes. These indorsements were in the handwriting of the payee of the notes, and

were not sufficient, of themselves, to take the debt out of the operation of the statute. §§303, 305 Burns 1908, §§301, 303 R. S. 1881.

The court also admitted in evidence, as bearing on this question, a book marked "exhibit 6," pages of which are copied into the record. As disclosed by the record,

5. counsel for appellant, at the time he offered this evidence, stated that the entries in the book were in the handwriting of Eliza J. Gray, and showed interest collected by her upon each of said notes from the year 1899 down to and including the year 1907. It is contended by counsel for appellant that, after admitting this evidence, the court refused to consider it in deciding the case, and that for this reason appellant was deprived of the benefit of material and competent evidence in his behalf, as completely as though the court below had excluded it. If the record shows that the court did not consider this evidence in reaching its decision, this would constitute reversible error, provided, of course, that the evidence was material and, in other respects, proper to be considered.

The question then arises, Does the record show that the court below did not consider the evidence in question? A

portion of the record is brought to this court by a

6. writ of *certiorari*, from which it appears that after the final judgment had been rendered in the court below, a *nunc pro tunc* entry was made, by which it was sought to embody in the record as a part of the finding and judgment, an opinion of the trial court purporting to have been delivered in writing by the judge of said court at the time the judgment and finding were entered. We are asked to consider this opinion for the purpose of determining what evidence was considered and what evidence was disregarded by the court in reaching a decision. No special finding of facts was requested, and none was made. The law does not require that a trial court shall deliver an opinion in writing. If such an opinion is delivered, it has no

proper place in the record; and, even though such an opinion is copied into the record of the lower court and embodied in the record on appeal, this court cannot consider it for any purpose. Where no request is made by any party

7. for a special finding of facts, a finding of the court, stating a part or all of the facts, will be treated on appeal as a general finding, and the facts specially found will be disregarded. *Northcutt v. Buckles* (1878), 60 Ind. 577. The same rule is applicable to a written opinion filed by the trial court, concluding with a general finding. The

opinion must be disregarded and the finding treated
8. as a general one. The court is presumed to have considered all the evidence admitted, and as the record does not overcome this presumption, no available error is shown on this point.

It is next contended by appellant that the decision of the court is not sustained by the evidence. It is strongly urged that the evidence bearing on the question of the pay-

9. ment of interest within the period covered by the statute of limitations is uncontradicted, and tends clearly to prove such payments. If no question were in issue other than the statute of limitations, and the decision of the trial court rested solely on that ground, a serious question would be presented as to the sufficiency of the evidence to sustain a decision in favor of appellee on that issue. There was, however, another issue of fact presented to the court below, upon which there is a conflict of evidence. Mrs. Kate Gray, the widow of Pierre Gray, testified that after the death of Isaac P. Gray, his widow, Eliza J. Gray, received from the government a sum of money amounting to eight or nine thousand dollars; that she gave a part of the money to Pierre Gray and a part of it to Bayard Gray; that she said they were not to pay it back; that she also said that it might be a mistake for old people to divide their money with their children, as their children might get tired of taking care of them; that after that time the mother paid no part

of the expenses of maintaining the house. On cross-examination the same witness said that the matter was talked over a number of times, and, about the time the money was turned over, Eliza J. Gray said, in the presence of her sons, Pierre and Bayard, and the witness, that it was never to be paid back.

There was also evidence from which the trial court could infer that the money referred to by this witness in her testimony was the same as that evidenced by the notes in suit, and that the notes were executed as evidence of an advancement and not of a loan. It is true that a note standing alone would authorize the presumption that it was evidence of an indebtedness from the maker to the payee, but this presumption may be rebutted. An advancement of money or other property from a parent to a child, as a general rule, is a question of intention, and this intention may be shown by the declarations of the parent on the subject, made at or near the time when the money or other property was turned over to the child. There is evidence in the record to sustain the judgment of the trial court on this issue. It is not the province of this court to weigh conflicting evidence, and, therefore, we cannot disturb the judgment of the court below, on the ground that the decision is not sustained by the evidence.

Complaint is made of the ruling of the trial court, excluding from evidence exhibits three, four and five. These exhibits, according to the statements made by counsel at 10. the time they were offered, were inventories of the property of Eliza J. Gray. The testimony of Ed S. Jaqua shows that these exhibits are in the handwriting of Eliza J. Gray, but there is no proof as to the time when, or the circumstances under which, these schedules or memoranda were made. An examination of these schedules shows that they were not original accounts between Eliza J. Gray and her son Pierre, in which entries had been made from time to time as the various transactions occurred, but they

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appear to be memoranda, made by Eliza J. Gray at some time for her own convenience and as an aid to her memory. Writings and memoranda so made are self-serving in their nature, and have never been considered as competent evidence in favor of the person making them. *Barber's Admr. v. Bennett* (1886), 58 Vt. 476; *Harrison's Executors v. Cordle* (1853), 22 Ala. 457; *Treadway v. Treadway* (1879), 5 Ill. App. 478; *Johnson v. Zimmerman* (1908), 42 Ind. App. 165; *Rouyer v. Miller* (1896), 16 Ind. App. 519; Elliott, Evidence §§486, 487.

Complaint is also made by appellant of the ruling of the trial court in excluding from the evidence two bank-books of Eliza J. Gray, trustee, in account with Fletcher's 11. Bank, 1895-1908. The statement of counsel, at the time these books were offered in evidence, indicated that they were offered as evidence bearing on the issue tendered by the set-off. As the finding on this issue was in favor of appellant, he could not have been harmed by this ruling.

We find no available error in the record. Judgment affirmed.

AMERICAN CAR AND FOUNDRY COMPANY v. SMOCK.

[No. 6,864. Filed May 13, 1910. Rehearing denied November 29, 1910. Transfer denied June 30, 1911.]

1. **COMPROMISE.—Contracts of.—Contradicting.—Oral Evidence.**—The execution of a receipt in settlement of a negligence case, in form: "I, [plaintiff], in full accord and satisfaction of such disputed claim do hereby acknowledge the receipt of the sum of \$350 to me in hand paid by [defendant] * * * from any and all actions, causes of action, claims and demands, for, upon, or by reason of, any damage, loss, injury, or suffering which hereafter may be sustained by me * * * in consequence of such accident and injury," does not preclude the plaintiff from proving by oral evidence that an agreement to give him work was also a partial consideration for such release, the consideration stated being a recital. pp. 360, 371.
2. **APPEAL.—Weighing Evidence.—Verdict.**—Where the evidence as to the facts is conflicting, the verdict is conclusive on appeal. p. 362.

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3. **CONTRACTS.—Avoidance.—Election.**—Where a person has an option to avoid a contract, his election to avoid must embrace the entire contract, and he cannot avoid the objectionable parts and affirm the favorable ones. p. 362.
4. **CONTRACTS.—Ratification.—Disaffirmance.**—A person cannot ratify a contract and afterwards disaffirm it. p. 362.
5. **PRINCIPAL AND AGENT.—Ratification.—Authority.**—Whether the general superintendent of a manufacturing company and the agent of a liability company were authorized to settle with an injured servant by paying him a certain sum and by agreeing to give him employment is immaterial, where the manufacturing company is pleading the payment of such sum as a complete discharge of the liability. p. 362.
6. **ELECTION.—Inconsistent Positions.**—Where a person has a right of election between inconsistent positions, he will be restricted to that first chosen. p. 363.
7. **COMPROMISE.—Election.—Discharge.—Estoppel.**—Where a defendant pleads in discharge of a liability a purported complete release which is asserted by the plaintiff to be only a partial release, the defendant is thereby estopped to question the release as it was actually made. Rabb, J., dissents. p. 363.
8. **CONTRACTS.—Discharge.—Action.—Answer.—Reply.—Corporations.**—In an action upon a contract presumably executed by a corporation in discharge of an alleged liability, such corporation may answer a want of authority on the part of the alleged agent who executed the contract, and, in such event, the plaintiff, if he succeeds, is required to reply the facts showing such agent's authority. p. 371.

From Hendricks Circuit Court; *James L. Clark*, Judge.

Action by W. Albert Smock against the American Car and Foundry Company. From a judgment for plaintiff, defendant appeals. *Affirmed.*

J. W. Hutchinson, W. A. Ketcham, R. M. Ketcham and H. S. Landers, for appellant.

Salem D. Clark and Brill & Harvey, for appellee.

ROBY, J.—Appellant is a corporation owning and operating a manufacturing establishment at Indianapolis. Appellee was employed by it as a carpenter, his work being connected with the building of cars. His hand was injured on April 2, 1906, while in appellant's service. He subsequently made a claim against the company

on account of such injury, and thereafter executed an instrument in terms as follows:

“Whereas, on or about April 2, 1906, an accident occurred resulting in bodily injury to W. Albert Smock, of Indianapolis, Indiana; whereas, said W. Albert Smock has made a claim on the American Car and Foundry Company for money compensation for such injury, asserting that said American Car and Foundry Company is legally liable for said accident and injury, which said legal liability said American Car and Foundry Company expressly denies: Now therefore, I, said W. Albert Smock, in full accord and satisfaction of such disputed claim, do hereby acknowledge the receipt of the sum of \$350, to me in hand paid by said American Car and Foundry Company, and in consideration thereof, I, said W. Albert Smock, do hereby remise, release and forever discharge the said American Car and Foundry Company, its successors and assigns, from any and all actions, causes of action, claims and demands, for, upon, or by reason of any damage, loss, injury or suffering which heretofore has been, or which hereafter may be, sustained by me, said W. Albert Smock, in consequence of such accident and injury. In witness whereof I have hereunto set my hand and seal this 5th day of July, 1906.

W. A. Smock.

Signed, sealed and delivered in the presence of L. L. Asham, attorney for W. A. Smock.
Burr J. Scott.”

It is averred in the complaint, with a wealth of detail, that, in addition to the payment of the sum specified therein, appellant agreed to take appellee into its employ at \$15 a week as soon as he was able to work, and keep him in its employ during the remainder of his life. The action is to recover for the breach of this contract. The issue upon which the case was tried was formed by a general denial. There was a verdict for appellee for \$5,000, and judgment accordingly.

Appellant's position is that the consideration stated in the instrument heretofore set out is in terms contractual, thereby precluding proof of any other or different consideration.

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The holding upon this proposition must be against appellant. The instrument contains no promise or engagement on its part making the consideration contractual. *Indianapolis Union R. Co. v. Houlihan* (1901), 157 Ind. 494, 54 L. R. A. 787.

The consideration stated is by way of recital, and parol evidence is therefore admissible to show the true consideration. *Stewart v. Chicago, etc., R. Co.* (1895), 141 Ind. 55, 59; *Pickett v. Green* (1889), 120 Ind. 584, 588; *Kentucky, etc., Cement Co. v. Cleveland* (1892), 4 Ind. App. 171.

The facts are similar to those involved in the case of *Pennsylvania Co. v. Dolan* (1893), 6 Ind. App. 109, 51 Am. St. 289, which case supports the conclusion here reached. The determination of this question is practically a determination of the appeal. The evidence supports the finding, which goes with the general verdict, in accordance with the averments of the complaint, that appellee released his claim against appellant, in consideration of the payment of \$350 and employment during the remainder of his life;

2. and however much controversy there may have been in the trial court as to such fact, it is, at this time, to be taken as an established fact in the case. Appellant has accepted and holds the release so procured. "A man who has

his option whether he will affirm a particular act or contract, must elect either to affirm or disaffirm it altogether; he cannot adopt that part which is for his own benefit and reject the rest. One cannot blow hot and cold." Herman, Estoppel §1039. If a party having

4. the right to repudiate or affirm a transaction affirm it he cannot afterward resort to his right of repudiation. That appellant cannot adopt the contract as its own, to the extent that the terms thereof are beneficial, and

5. repudiate the obligation to pay the stipulated consideration, is "entirely too inconsistent with reason to leave much room for dispute." The persons who acted for appellant in the transaction, were the general superintend-

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ent of its Indianapolis plant and the agent of a liability insurance company. It is, so far as the point under consideration is concerned, immaterial whether either had actual authority to do so.

A party cannot, either in the course of litigation or in dealings *in pais*, occupy inconsistent positions; and where

one has an election between several inconsistent
6. courses of action, he will be confined to that which he first adopts. *Strosser v. City of Fort Wayne* (1885), 100 Ind. 443, 452; *Ney v. Swinney* (1871), 36 Ind. 454; *Peters v. Bain* (1890), 133 U. S. 670, 33 L. Ed. 696, 10 Sup. Ct. 354; *Stuart v. Hayden* (1898), 169 U. S. 1, 42 L. Ed. 639, 18 Sup. Ct. 274; *Daniels v. Tearney* (1880), 102 U. S. 415, 26 L. Ed. 187.

When appellee brought this action, appellant was called on to answer. If the contract by which the release had been secured was not its contract, that was the time to re-

7. pudiate it. It was then put to an election. *Robb v. Voss* (1894), 155 U. S. 3, 42, 39 L. Ed. 52, 15 Sup. Ct. 4. It did not repudiate the contract, but, holding the release thereby secured, it entered into a litigation to determine what consideration appellee was by its terms to have. What that consideration was, became matter of proof. The trial court has settled the issue according to evidence, and appellant must conform to the terms of the contract as it was made, and pay to the appellee the consideration for which he released his claim. Bigelow, Estoppel (5th ed.) 717. The maxim, "He is not to be heard who alleges things contradictory to each other," applies, and lack of authority by appellant's general superintendent cannot be alleged against the fact that it holds the value thereby secured.

The question is not one of ratification by a principal, but of estoppel by election. *Strosser v. City of Fort Wayne*, *supra*.

In view of this conclusion, it is not necessary to discuss

various questions that have been mooted. The amount of recovery is not challenged. The judgment is affirmed.

Rabb, P. J., dissents.

DISSENTING OPINION.

RABB, J.—I am unable entirely to concur in the views expressed in the foregoing opinion of the court. Appellee's case is predicated on a contract or promise, alleged to have been made by appellant to furnish appellee employment in its service. Appellant is a manufacturing corporation, with its principal offices in the city of St. Louis, and owning and operating two manufacturing plants in this State, one of them located in the city of Terre Haute and the other located in the city of Indianapolis, with a resident manager of its business in this State residing in Terre Haute. Appellee undertakes to sustain his complaint by proof of conversations had with appellant's general foreman, who had charge of its manufacturing plant in Indianapolis, where the injury occurred, out of which the contract is alleged to have grown. It is therefore essential to appellee's case that it appear that this person, with whom the alleged contract is said to have been made, was duly authorized by the company to transact said business. There is no conflict in the evidence in regard to the position in appellant's service of this general foreman, or to the nature of his duty, nor is there any evidence that he was especially authorized by appellant to settle appellee's claim for damages on account of his injury, or to settle any claims against the company for damages of any character; and the question presented is whether the power and authority to make this contract can be implied from the facts and circumstances shown to exist.

When an agency is created by a written instrument, or the facts out of which it is claimed an agency arises are undisputed, the existence of the agency and the scope of the agent's authority are questions of law for the court.

Mechem, Agency §105; 2 Page, Contracts §963; 31 Cyc. 1672, and cases cited; 1 Am. and Eng. Ency. Law (2d ed.) 967.

Here, the evidence shows that Baker, the man with whom appellee claims to have had dealings, had supervision of appellant's manufacturing plant at Indianapolis; that he had authority to employ and discharge servants; that the general direction of the work carried on in the plant was under his charge; that it was a part of his duty to superintend the making of improvements in the plant, the sale for cash of some of its products, and, to a limited extent, the purchase of material to be used in the factory. It does not appear that he had anything to do with administering the business affairs of the company, nor that he had any authority to pay its debts, even where they were liquidated and uncontroverted, nor to settle unliquidated but admitted liabilities, much less to settle and pay demands for which the company expressly denied liability. The authority of Baker was clearly not coëxtensive with the business of his master, and was limited to those matters that were necessary and proper to be done in operating appellant's manufacturing plant in the usual and accustomed way.

The authority of the agent must find its source in the intention of the principal, either express or implied. Where one is given supervision of a manufacturing plant, with implied authority to do all things necessary to be done in the usual and accustomed way and manner of carrying on and operating the plant, will such authority carry with it the authority to allow claims for damages for personal injuries to employes engaged in the work in such plant, and to contract for the settlement of such claims? The allowance of such claims and the settlements therefor are clearly not necessary to carrying on the work of the plant. While the injury grows out of the operation of the plant, the settlement of the question of the legal liability of the company therefor is not one that naturally appertains to the

work of operating the plant, but must, of necessity, belong in that department of appellant's business that has to do with the administration of its affairs, with the management of its finances, with the payment of its debts, and the adjustment of disputed liabilities.

We are cited by appellee to the cases of the *American Tel., etc., Co. v. Green* (1905), 164 Ind. 349, and *American Quarries Co. v. Lay* (1906), 37 Ind. App. 386, to support the proposition that the jury had a right to infer, from the relation that the evidence showed existed between the company and Baker, that Baker was authorized to make the contract sued on.

We think there is a very marked distinction between the cases cited and this case. In the case of the *American Tel., etc., Co. v. Green*, *supra*, appellee was in appellant's employ, stringing wires upon poles, and while engaged in this work fell from one of the poles and was severely injured. One Tice was a district foreman in appellant's service, and had immediate charge of the work in which appellee was engaged at the time of his injury. Tice procured from appellee a written release of all claims for damages against the company, as follows:

"Know all men by these presents, that I, John H. Green, of Hobart, Lake county, Indiana, in consideration of the sum of \$1, and other good and valuable considerations, to me in hand paid by the American Telephone and Telegraph Company, the receipt of which is hereby acknowledged, have remised, released, etc., and by these presents do for myself, my heirs, etc., remise and release and forever discharge said American Telephone and Telegraph Company from any and all manner of actions, causes of action, claims and demands whatsoever, in law or in equity, which against the said American Telephone and Telegraph Company I ever had, now have, or which I, my heirs, executors, administrators hereafter can, shall or may have, for or by reason of any matter, cause or thing whatsoever, and especially for and by reason of the accident which happened to me on January 11, 1902, when I fell from a pole," etc.

Said written release was delivered to said district foreman, and was sent by the district foreman to the company and retained by it. The complaint charged that the written release was procured upon the consideration that appellant pay to appellee his wages, doctor's bill and expenses until he was able to go to work after his recovery from the injury. It was shown in evidence that Tice had general supervision and oversight of the employes in his district; that it was a part of his duty, under special instructions from the company, to settle damage suits resulting from injuries to employes; and that after the contract was entered into it was in part carried out by the company. Upon this state of the evidence, there could be no question that the jury was fully warranted in finding that Tice was authorized by the company to enter into said contract, and that by virtue thereof it obtained and retained appellee's written release. But that is not the case here.

In this case there is no evidence to show that Baker had anything whatever to do with the settlement of disputed claims for damages for personal injuries. He had nothing to do, so far as the evidence was brought to the minds of the jury, with procuring the written release. The written release was procured by the agent of the insurance company, and was sent by him to the company. It contained no allusion whatever to any negotiations or promises made by Baker, and did not indicate to the company that Baker had anything to do with it.

In the case of the *American Quarries Co. v. Lay, supra*, the written release executed by appellee to appellant showed on its face that it was executed upon the consideration that appellant sought to recover, and that the release was received and accepted with this recital in it, and was retained by the company. It was witnessed by the company's superintendent, delivered to him, and his authority to accept the release was not questioned. There was no room in that case to hold that the contract was not the contract of the company, and

that the superintendent of the company, who acted for the company in procuring its execution, was not authorized to do the thing he did, the benefit of which the company accepted and retained.

It is insisted by appellee that appellant has ratified the contract by accepting the benefits thereof, and by retaining them in its possession. There is no evidence that tends to show that the company, or the managing officers thereof, ever at any time prior to the bringing of the suit, had any knowledge whatever of the promise alleged in the complaint to have been made by its superintendent Baker to appellee. There is nothing shown in the evidence to put it on inquiry; nothing that would justify an inference of any knowledge on this subject.

It is not pretended that appellant held out to the public that said superintendent had power or authority to settle claims of any character against said company; and while appellee insists that the jury might have found, from the circumstances that Baker testified that he made reports to the head office of his doings, that the company was informed of the contract Baker had made with appellee, there is no evidence that Baker reported such transaction. He expressly denies that he made such contract. It is not reasonable to presume that he made a report of any such character, and appellee knew that the release that he executed would be furnished the company, not through the hands of Baker, but through the hands of Scott, the insurance agent. He knew that the company held a policy of insurance that indemnified it against liability to him on account of his injury, and it was reasonable to suppose that the company, from the character of the instrument that appellee signed, would suppose that the consideration therein expressed was the full consideration for executing the release.

I cannot agree that appellee, by bringing this action and averring in his complaint that the consideration upon which

his written release was given to appellant, was the payment to him of \$350, and appellant's promise to employ him during his life at wages of \$15 a week, imposed on appellant a duty to elect whether it would retain the release in question and pay the consideration on which appellee avers it was executed, or offer to surrender the release upon the repayment of \$350, when the contract actually made between appellee and appellant provided simply for the payment by appellant to appellee of \$350, and which had been fully performed by appellant.

Appellee's action is not brought to recover on the injury, nor is it a suit in equity to set aside the release, on the ground of fraud or mistake. It is simply an action at law, based on the breach of an express contract alleged to have been made by appellant to furnish appellee with employment. Appellant is not asserting any right whatever under the release. It simply denies that it made the promise appellee sues on, and this is the sole issue. The proposition that a person who has entered into a contract with another and fully performed all of its terms, can be put to an election of rights by the claim of the other party to the contract that he was induced to enter into it by some promise made by some one else, of which the contracting party on the other side had at the time no knowledge, and which the party making it had no authority from him to make, is, in my view, radically and fundamentally wrong, and no authority can be found that tends to sustain such proposition.

The cases cited in the opinion of the court, as sustaining this contention, are, to my mind, far away from the question. In the case of *Robb v. Voss* (1894), 155 U. S. 3, 42, 15 Sup. Ct. 4, 39 L. Ed. 52, referred to as being in point upon this question to sustain the views of the court, a suit in equity had been instituted, making parties thereto, among others, the grantees named in a certain deed for premises therein described, and among other relief asked was that such deed be declared a mortgage, the amount due thereon fixed, and

the rights of the parties ascertained. Certain attorneys appeared to that suit for the grantees named in the deed, and consented to a decree in the case declaring the deed a mortgage, fixing the amount of the lien, directing the sale of the premises, and the distribution of the proceeds. Under the decree the premises were sold, and, from the proceeds arising from the sale, the amount fixed as the grantee's lien on the premises was paid to the attorneys appearing for them in the suit. The funds thus paid into the attorneys' hands were by them embezzled. Afterwards the grantees in said deed brought an action against the attorneys to recover the money so embezzled, recognizing their authority to appear in the case and to receive the money. This case, without proceeding to judgment, was dismissed, and afterwards the grantees instituted an action against the purchaser at sale to recover the money paid by them to said attorneys. Said action was based on the theory and the alleged fact that the attorneys so appearing in the suit in equity for said grantees did so without authority. It was held that said grantees, having instituted the action against the attorneys to recover the moneys received by them as such attorneys, were thereby precluded from afterward taking the inconsistent position that such attorneys had no authority to appear in the case in question for them, but that is very far away from the question here.

In this case, appellant made a contract with appellee by which, in consideration of \$350, appellee released appellant from a certain liability, and so far as appellant knows, \$350 is the sole inducement for appellee's entering into said contract. Can it be possible that a secret promise made by some unauthorized person, not brought to the knowledge of appellant when the contract between appellee and appellant is made, can affect the rights and liabilities of either party under the contract, made between themselves? I think not.

Evidence was submitted and instructions were given by the

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court to the jury, over appellant's objection, upon the theory that, from the facts disclosed by the evidence, the jury might infer that Baker was authorized by appellant to concede a legal liability to appellee for the injury received by him, and to contract with appellee for its settlement. Such inference was not justified by the facts and circumstances disclosed by the evidence, and the jury should have been so instructed.

ON PETITION FOR REHEARING.

ROBY, J.—Appellant's counsel have reargued with force and ability their proposition that the consideration

1. expressed in the release was thereby made contractual. This is in fact the pivotal proposition involved, and the conclusion announced on this point was and is unanimous.

Appellee was in the employ of appellant company. He was injured while in such service, and liability or no liability for damages on account thereof was a matter between them.

The complaint counts upon a parol promise averred to have been made in consideration of a written release of liability.

Appellant denied the claim so made. The issue was one of fact.

It being first averred and then established that appellee had surrendered his claim upon the consideration named, and it appearing that appellant had not only accepted the release so procured, but had asserted it at the trial, the doctrine, that "he who derives the advantage ought to sustain the burden," is directly applicable. This is not a new doctrine; it is rather a principle than a doctrine.

A contract for the sale of land made by one who had no authority to act for the owner, who had taken and

8. assigned notes therein provided for, was held to bind the owner. In the case of *Moore v. Pendleton*

(1861, 16 Ind. 481, Worden, J., in his opinion upon such facts, adopted the statement of a standard text-writer (1 Parsons, Contracts p. 46), which is as follows: "Generally, if the principal receive and hold the proceeds, or beneficial results, of the contract, he will be estopped from denying an original authority, or a ratification." See, also, *Adams Express Co. v. Carnahan* (1902), 29 Ind. App. 606, 94 Am. St. 279.

Appellant might have set up by special plea that the contract sued on was made by persons who were not authorized to act for it in that behalf. Had it done so, a reply of the facts relied upon to overcome such lack of authority would have been proper. It did not plead such defense, but came into court holding and claiming under the contract, and thereby obviated the need of any further pleading by appellee.

The petition for rehearing is overruled.

MCKNIGHT v. KINGSLEY ET AL.

[No. 7,069. Filed October 27, 1910. Rehearing denied December 30, 1910. Transfer denied June 30, 1911.]

1. **TRUSTS.**—*Express.*—*Creation of, by Parol.*—*Executed.*—The rule that an express trust in land cannot be created by parol has no application where the alleged express trust has already been executed. p. 376.
2. **FRAUDULENT CONVEYANCES.**—*Consideration.*—*Marriage.*—*Creditors.*—*Answers.*—*Partial.*—In a suit by a creditor to set aside an alleged fraudulent conveyance made by defendant husband to his wife, an answer in bar of the cause of action that the fee of such land was conveyed to the wife, subject to a life estate in the husband, in consideration of marriage and that such marriage had been accordingly consummated, is bad, because, at the time of such conveyance the husband owned a life estate in such land, such interest being subject to the demands of creditors. p. 376.
3. **FRAUDULENT CONVEYANCES.**—*Intent.*—*Equitable Rights.*—*Notice of Creditor's Claim.*—*Evidence.*—Evidence that the defendant wife before marriage entered into a contract with the defendant husband whereby she should receive his property in consideration of her marriage to him and of caring for him during his

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sickness, such wife having no knowledge of any claims against him, sustains a judgment for her in a suit to set aside the conveyance so made to her, though at the time the conveyance was actually made she knew of the plaintiff's claim, and though she testified that the conveyance was made to prevent the plaintiff from obtaining the property. p. 376.

4. *WITNESSES.—Competency.—Default Judgment.—Husband and Wife.—Fraudulent Conveyances.*—In a suit to set aside an alleged fraudulent conveyance made by a husband to his wife, such husband and the trustee through whom the transfer was made are competent witnesses in behalf of such wife, though a default judgment was taken against such husband. p. 378.
5. *APPEAL.—Defective Answer.—Harmless Error.*—The overruling of a demurrer to a defective paragraph of answer does not constitute harmful error, where the special findings show that the case was correctly decided on the merits. p. 378.

From Harrison Circuit Court; *C. W. Cook*, Judge.

Suit by Ada McKnight against Alexander Kingsley and others. From a judgment for defendants, plaintiff appeals. *Affirmed.*

L. A. Douglass and *H. H. Richard*, for appellant.

William Ridley, for appellees.

COMSTOCK, C. J.—Appellant brought this action against appellees to set aside a fraudulent conveyance of real estate from appellee Alexander Kingsley to his wife, Mary C. Kingsley, and against appellee Clara Melton to set aside a fraudulent mortgage to her, and against appellee Corydon National Bank to declare the priority of a judgment against Alexander Kingsley, obtained by appellant for breach of a marriage contract.

Appellee Mary C. Kingsley answered in two paragraphs, the first, a general denial. The second, in substance, alleged that on the — day of —, 1905, her codefendant was the equitable owner of the real estate described in plaintiff's complaint, and that John Kaga held the legal title thereto; that on said date defendant Mary C. Kingsley and her codefendant, Alexander Kingsley, were both unmarried, and her said codefendant had been for a long time, and was

then, sick and disabled, and wanted said defendant, who was formerly his wife, but was divorced from him, to nurse and wait on him in his sick and enfeebled condition, and agreed with said defendant that if she would marry him he would have said John Kaga to convey said real estate to him (Alexander Kingsley) during his life, and at his death to said defendant; that, in consideration of the agreement of her codefendant to have said real estate conveyed to her during his life, and at his death to her in fee simple, she and her said codefendant, Alexander Kingsley, were on the — day of —, 1905, duly married; that afterwards, on March 14, 1905, in compliance with his said agreement, defendant Alexander Kingsley caused said John Kaga and Mary J. Kaga, his wife, to convey by their deed of that date, to Alexander Kingsley, during his natural life, and at his death to said defendant, the real estate described in the complaint, which said deed was duly recorded on March 23, 1906; that during her former marriage with said Alexander Kingsley she let him have \$150 of her separate funds, to be applied in part payment for said real estate described in plaintiff's complaint; that during said defendant's sickness he had incurred an indebtedness on account thereof of about \$150, and had no means or property with which to pay said indebtedness except his said life estate in said real estate; that he agreed with defendant Mary C. Kingsley, that if she would join him in the conveyance of said real estate to a trustee who would convey it to him, and then join in a mortgage on said real estate to secure a loan of \$150, to pay his said indebtedness, he would, after said loan had been procured, reconvey to her, this defendant, the whole of said real estate in fee simple; that afterwards, in consideration of the agreement of her said codefendant to reconvey said real estate to her in fee simple this defendant, on the — day of —, 1905, joined her said husband in a conveyance of said real estate to Clara Melton, who was selected, by agreement, to act as trustee to reconvey said real

estate to said Kingsleys, and thereupon, in pursuance of said agreement, on the same date said Clara Melton by her deed conveyed said real estate to defendant Alexander Kingsley; that said defendant procured a loan of \$150 from defendant Corydon National Bank, and to secure said loan he and defendant Mary C. Kingsley executed a mortgage on said real estate, which is the same mortgage mentioned in plaintiff's complaint, and said loan was procured for the purpose of, and the amount thereof was used in, paying the indebtedness incurred by defendant Alexander Kingsley during his said sickness; that afterwards, on August —, 1905, in compliance with the agreement made with defendant Mary C. Kingsley, said defendant Alexander Kingsley reconveyed said real estate to this defendant in fee simple, subject to said mortgage to defendant Corydon National Bank; that since the date of her marriage to defendant Alexander Kingsley she has lived with him, nursed him and waited on him until he recovered from his sickness, and is still his wife, living with him and caring for him; that at the time she married defendant Alexander Kingsley, and also at the time of the conveyance of said real estate by her and her said husband to said Clara Melton, trustee under said agreement theretofore made by them, said defendant says she had no knowledge of plaintiff's cause of action against her said husband, on which judgment was rendered against him as alleged in the complaint.

A demurrer for want of facts to this paragraph of answer was overruled, and a reply in general denial filed thereto. Upon the issues thus formed the cause was tried, and, upon proper request, the court made a special finding of facts, stated conclusions of law thereon, and rendered judgment in favor of appellee Mary C. Kingsley, and against appellant for costs.

The assignments are that the court erred in overruling the demurrer to said second paragraph of answer, and the motion for a new trial.

In support of the demurrer it is claimed that the agreement seeks to show an express trust; and that it is

1. bad, because an express trust cannot be created by parol. The agreement was executed, and the rule does not apply.

Said second paragraph of answer was pleaded in bar. It alleges that appellee Mary C. Kingsley married appellee Alexander Kingsley in consideration of his promise to

2. convey to her in fee the land in controversy, subject to his life estate. This agreement, it is alleged, was carried out, and she received the consideration contracted for. On August 18, 1905, when the last conveyance was made, Alexander Kingsley was the owner of a life estate in the land, subject to sale to satisfy the demands of his creditors. Appellant was a creditor. *Bishop v. Redmond* (1882), 83 Ind. 157. As to creditors, said Kingsley could not divest himself of this title in favor of his wife, for the consideration stated. Said paragraph, therefore, was only a partial answer to the complaint, and was not sufficient.

It is argued that special findings fifteen, seventeen

3. and eighteen are not sustained by sufficient evidence and are contrary to law.

Said fifteenth finding is, in effect, that a week prior to his marriage, Kingsley promised defendant Mary C. Kingsley that if she would marry him he would give her everything he had. The debts were a charge on the land, and he was to give her a deed to said real estate. This was agreed to by her. This finding is established without conflict of the evidence.

The seventeenth finding is, "that said deed of conveyance mentioned in plaintiff's complaint was given and received by defendant Mary C. Kingsley without any knowledge on her part, that it would hinder, delay and defraud plaintiff from the collection of her claim for damages aforesaid, and

without any intent to hinder, delay and defraud plaintiff from the collection of her said debt and claim for damages.”

The eighteenth finding is that the conveyance from Kingsley to his wife was not made with a fraudulent intent; that in May, 1905, Kingsley and his wife executed a mortgage on said land to the Corydon National Bank to secure \$150 borrowed by Alexander Kingsley; that the mortgage was duly recorded in the proper records, and was not made to cheat, delay or defraud plaintiff from collecting her said claim; that Mary C. Kingsley, on April 18, 1905, without any fraudulent intent on her part, and without knowledge of such intent on the part of her husband, received said deed for said land, and that said money, or a part thereof, was used to pay physicians' bills, and for medicine, drugs, etc.

It is insisted that, inasmuch as appellee Mary C. Kingsley testified that she took the deed with the intention that appellant McKnight should not get any of the property, and that at the time she received the last deed she knew that appellant had brought suit against said appellee's husband for damages for breach of promise of a marriage contract, said findings were contrary to the evidence.

The evidence clearly shows that the land was conveyed in pursuance of a contract made before marriage and for a valuable consideration. This agreement was made and executed prior to any knowledge upon the part of appellee Mary C. Kingsley of any claim that appellant had against Alexander Kingsley. Said appellee learned of the claim a few days before the last conveyance. Had the deed been executed when the contract was made, there would have been no suggestion of fraud. From the time the marriage was consummated under the agreement Mary C. Kingsley became the equitable owner of said real estate. The fact that she intended, when she took the conveyance, that appellant was to have no part of the property, did not, although she knew of the pending suit, make her act fraudulent; for,

under the evidence, the fact that she intended to prevent appellant from getting any part of the real estate would be immaterial. She was only securing what belonged to her. Both she and her husband testified that the conveyance was made to carry out the antenuptial contract. In her testimony she claimed that it was her property, because of the agreement, and she believed that appellant had no interest in it. Doubtless it was in this sense that the court interpreted her testimony.

Another reason set out in the motion for a new trial is that the court admitted in evidence the testimony of defendant Alexander Kingsley on behalf of defendants.

4. after said Kingsley had suffered a default to be taken.

Such action did not disqualify him as a witness, and could not deprive either party to the suit of the benefit of his testimony. The court also permitted Clara Melton to testify, in effect, that she conveyed said real estate as trustee. All the evidence showed that this was the capacity in which she acted. In this ruling there was no error.

While the court erred in overruling the demurrer to said paragraph of answer, it appears from the special findings that the judgment was rendered on the last deed of

5. conveyance, and that said deed was made, in pursuance of an antenuptial contract, for a valuable consideration. The ruling was therefore harmless.

There are inconsistencies in the testimony, but without weighing the evidence this court cannot hold that the facts were not correctly found.

Judgment affirmed.

DEVIN v. MCCOY, TRUSTEE.

[No. 7,743. Filed February 21, 1911. Rehearing denied May 9, 1911. Transfer denied June 30, 1911.]

1. WILLS.—*Construction.—Purpose.*—The object of construing a will is to determine the testator's intention. p. 381.
2. WILLS.—*Trusts.—Termination.*—A trust created by a will bequeathing and devising to testator's two grandchildren the share that their deceased father would have received, "subject to the conditions hereinafter named," and providing for a trustee to take and to hold such property for such children "until the contingencies named in the next succeeding clause of the will, in the meantime using of the profits thereof enough only for their education and economical support," and providing that "if [plaintiff] dies before he has children born unto him, his share of [testator's] estate shall go to his sister, * * * if she survives him," is not a spendthrift trust, and terminates upon the birth of a child to the plaintiff. pp. 381, 382.
3. WILLS.—*"Contingencies."*—*Meaning of.*—The word "contingencies," as used in a will providing that the trustee shall hold certain property "until the contingencies named," imports some future event that may or may not occur. p. 382.
4. APPEAL.—*Mandate.—Death.*—Where appellant died before his appeal was decided, the judgment will be made as of the date of submission. p. 383.

From Gibson Circuit Court; *Herdis Clements*, Judge.

Suit by Elmer G. Devin against John R. McCoy, as trustee of Elmer G. Devin and others. From a judgment for defendant, plaintiff appeals. *Reversed.*

M. M. Bachelder, *W. W. Medcalf* and *John H. Miller*, for appellant.

John R. McCoy, *O. M. Welborn* and *J. E. McCullough*, for appellee.

LAIRY, J.—This suit was brought by appellant against appellee, for the purpose of obtaining an accounting by John R. McCoy, trustee under the will of Nancy Devin, deceased, and praying that said trustee be ordered to turn over to appellant the property in his hands, upon the theory that

the trust created by the terms of said will had terminated before the commencement of the suit.

Items five, six and seven of the will of Nancy Devin create the trust here under consideration. It is necessary to the decision of this case that a construction be placed on this part of the will, and therefore we set out these items in full.

“Item 5. All the residue of my estate and personal property shall be divided equally among my children, Susan E. Ragland and Sallie Devin, and my two grandchildren, Nellie R. Devin and Elmer G. Devin, to receive the same share that would have descended to James A. Devin (now deceased), who was their father, and to take and receive under this will subject to the conditions hereinafter named.

Item 6. I hereby nominate and appoint Henry L. Wallace as trustee for Nellie and Elmer, and for each of them, who shall take and hold and manage such of my estate as is given to said grandchildren, until the contingencies named in the next succeeding clause of the will, in the meantime using of the profits thereof enough only for their education and economical support, having view of the probable value of their inheritance.

Item 7. If Nellie R. Devin dies before she has children born unto her, her share of my estate shall go to her brother, Elmer, if he survives her. If Elmer dies before he has children born unto him, his share of my estate shall go to his sister, Nellie, if she survives him, but if they both die without having children born to them, their shares shall be distributed to the other beneficiaries of item five of this will.”

The complaint sets out the will, and alleges that it was duly probated after the death of the testator; that Henry L. Wallace, who was named as trustee therein, died, and that John R. McCoy was, by the Gibson Circuit Court, appointed his successor; that appellant was lawfully married on October 9, 1909, and that a child was born to him, by virtue of said marriage, which was still living at the time the suit was commenced.

A demurrer for want of facts sufficient to state a cause of action was sustained by the trial court, and this is the only error relied on for reversal.

It is contended by the attorneys for appellee that the ruling of the lower court is correct, for the reason that the complaint shows that the trust created by the will of Nancy Devin had not terminated when this suit was commenced. They take the position that the trust created by said will was a spendthrift trust, that it was intended to continue during the life of Elmer Devin, and that it cannot, by the terms of the will creating it, terminate before his death. Appellant contends that the trust was terminated, so far as Elmer Devin was concerned, before the action was commenced, by the marriage of Elmer Devin and the birth of a child as shown by the complaint.

When did the testatrix intend that the trust created by her will should terminate? This is the decisive question in this case. In construing a will, effect should be given

1. to the intention and purpose of the testator, if this can be gathered from the terms of the will. Was it the purpose of the testatrix in creating said trust to provide for the maintenance of appellant during his life,
2. and at the same time to secure it against his improvidence and incapacity, and preserve the property unimpaired to his heirs? If so, the trust would continue during the life of the *cestui que trust*, and the position of appellee should be sustained. We cannot think that the provisions of the will creating this trust indicate such an intention. Item six of the will does not expressly provide that the trustee shall hold the estate given to Nellie Devin and Elmer Devin during their lives, or the life of either of them; but it does provide that he shall hold and manage such estate until the contingencies arise that are named in the next succeeding clause of this will, in the meantime, using of the profits thereof enough only for their education and economical support, having in view the probable value of their inheritance.

A contingency is some future event that may or may not occur. It is evident that the testatrix had in mind some such

event, upon the happening of which the trust was

3. to terminate. Item seven of the will is not entirely clear as to the contingency referred to in item six. It provides that "if Nellie Devin dies before she has children born unto her, her share of my estate shall go
2. to her brother, Elmer, if he survives her. If Elmer dies before he has children born unto him, his share of my estate shall go to his sister, Nellie, if she survives him, but if they both die without having children born to them, their shares shall be distributed to the other beneficiaries of item five of this will."

If we should hold that the termination of the trust depended upon the death of the *cestui que trust*, this would be to say that the termination of the trust depends upon the happening of an event that is a certainty and not a contingency. If we should give the will this construction, the contingency that appellant might or might not have a child or children born to him before his death would have no effect in hastening or delaying the time of the termination of the trust, as the trust would terminate at such death, regardless of whether or not he had children born during his lifetime.

To our mind the provisions of the will under consideration do not evince an intention on the part of the testatrix to create a spendthrift trust. We do not think it was her intention to tie up the property in the hands of the trustee during the life of her grandchildren, for the purpose of providing for their maintenance, and at the same time securing it against their extravagance or improvidence. The provisions of item seven seem rather to indicate that it was her purpose to control the ultimate disposition of her property, so that it might not go to strangers or depart from those of her own blood, and that she created this trust for the purpose of securing this end. The provisions of this item in her will indicate that she contemplated that one or both her grandchildren might marry and die without

issue, and that the property, if given to them absolutely, would go to the surviving husband or wife, to the exclusion of the kindred, who were of the blood of the testatrix. To prevent this result, she placed the property willed to her grandchildren in the hands of a trustee, and provided that he should take, hold and manage it until the happening of a contingency which would prevent this result. True, the birth of a child might not absolutely prevent this result, for such child might die before its parent, and the *cestui que trust* thus die childless. This consideration does not, however, change our opinion as to the purpose of the testatrix in creating the trust, as she was no doubt willing to risk the possibility of the child's outliving the parent. She evidently intended that if either of said grandchildren married and had a child born, this contingency should terminate the trust as to him, and he would be entitled to the property willed to him. We therefore hold that the complaint shows that the trust, as far as appellant is concerned, was terminated before this suit was commenced, by the happening of the contingency provided for in item seven. The demurrer to the complaint should have been overruled.

The death of appellant has been suggested, to the

4. court, and the judgment in this case is reversed as of the date of submission.

DUNN v. MEANS.

[No. 7,308. Filed October 3, 1911.]

1. PARENT AND CHILD.—*Adopted Children.—Statutes.—Construction.*—The statutes providing for the adopting of children should be construed so as to establish reciprocal relations between such adopting parents and the adopted children, the purpose being to make the legal status of such children the same as if they were the real children of such parents. p. 387.
2. DESCENT AND DISTRIBUTION.—*Adopted Children.—Husband and Wife.*—Under §3027 Burns 1908, §2489 R. S. 1881, providing that "if a * * * wife die intestate, leaving no child, but leaving a

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father and mother, or either of them, * * * her property * * * shall descend three-fourths to the * * * widower, and one-fourth to the father and mother jointly, or to the survivor of them," and §870 Burns 1908, Acts 1883 p. 61, providing that an adopted child shall "be entitled to and receive all the rights and interest in the estate of such adopting father or mother * * * that such child would if the natural heir of such adopting father or mother: Provided, however, that should such adopted child die intestate, without leaving a wife or husband, issue or their descendants * * * seized of any * * * property which may have come to such child by gift, devise or descent from such adopting father or mother, such property * * * shall * * * descend to the heirs of said adopting father or mother," and §871 Burns 1908, §826 R. S. 1881, providing that an adopted child "shall occupy the same position" as a natural child, the property of an adopted daughter, leaving a natural father and mother, an adopting father, a husband, but no children, descends three-fourths to the husband, and one-fourth to the adopting father; and the fact that the form of the property inherited from the adopting mother had been changed, does not change the descent. p. 388.

3. STATUTES.—*Derogatory of Common Law.—Construction.*—Statutes in derogation of the common law will be strictly construed, but not in such manner as to defeat their purpose. p. 388.

From Johnson Circuit Court; *J. E. McCullough*, Special Judge.

Suit by John C. Dunn against Ora W. Means. From a judgment for defendant, plaintiff appeals. *Reversed.*

William Featherngill, for appellant.

Miller & Barnett, for appellee.

ADAMS, J.—This suit was brought by appellant against appellee, asking for the partition of a certain lot in the city of Franklin, and for the appointment of a commissioner to sell said lot and distribute the proceeds, one-fourth to appellant and three-fourths to appellee.

The question presented by this appeal arises upon an exception to the conclusions of law stated by the court upon the special finding of facts. The facts, as disclosed by the finding, are, briefly, as follows: On September 30, 1886,

John C. Dunn, the appellant, and his wife, Elizabeth F. Dunn, on their joint petition to the Johnson Circuit Court, and by the order and judgment of said court, adopted a minor child, Lily B. Littell, as their own child, who thereupon took the name of Lily B. Dunn. At the time of said adoption, the natural parents of said child were George M. Littell and Mary J. Standiford. Elizabeth F. Dunn had received said child into her keeping a few days after her birth, and continued to keep her. Soon after the marriage of appellant and Elizabeth F. Dunn, which occurred when said child was about nine years of age, she was adopted as the child of John C. and Elizabeth F. Dunn. She remained a member of said family until May 9, 1900, when she married appellee, Ora W. Means. Lily B. Dunn had no property at the time of her adoption, and never received any property from her natural parents. On July 24, 1901, Elizabeth F. Dunn died intestate in Johnson county, the owner of certain real estate and personal property in said county. She left surviving her, as her only heirs at law, appellant and said adopted daughter, Lily B. Means. Lily B. Means inherited from her adoptive mother the undivided two-thirds of twenty-five acres of land, and received, from the administrator of the estate of Elizabeth F. Dunn, United States bonds of the value of \$5,600, a check for \$1,437.78, also a check for \$84.28, the amount she had paid on debts of decedent. The bonds were sold, the checks were cashed, and the whole amount, aggregating \$7,122.06, deposited in the Citizens National Bank of Franklin to the credit of Lily B. Means, and so remained until checked out by her. Subsequently Lily B. Means purchased from appellant his interest in the twenty-five acres inherited from his wife. She sold said twenty-five acres for \$6,000, which amount was also placed to her credit in the Citizens National Bank of Franklin. In December, 1901, said Lily B. Means purchased the lot in the city of Franklin which is the subject of this action, paying therefor the sum of \$5,000, payment being

made in part by a check received from the sale of the real estate before mentioned, and by her own personal check drawn against her account in the Citizens National Bank. Lily B. Means had no property at the time of the purchase of said lot, except that herein noted. On April 14, 1907, she died intestate, and left surviving her no child nor children, nor the descendants of any child or children, but left her husband (appellee), her adopted father (appellant), her natural father, George M. Littell, and her natural mother, Mary J. Standiford. At the time of her death she was the owner in fee simple and in possession of said lot in the city of Franklin, and said property was not susceptible of division without injury to the owners thereof. On October 14, 1907, George M. Littell, his wife joining therein, and Mary J. Standiford, executed quitclaim deeds to appellee, releasing to him whatever interest they had in said lot.

Upon the facts found, the court stated as conclusions of law that appellant had no interest in the real estate of which Lily B. Means died the owner, was not entitled to partition thereof, and that appellee was entitled to have his title quieted.

Appellant excepted to the conclusions of law, and assigned said conclusions as error. The question presented for determination is, Did the adoptive father inherit the undivided one-fourth of said estate from Lily B. Means, or was said undivided one-fourth inherited by her natural father and mother, and therefore passed to appellee by their quitclaim deed?

Section 3027 Burns 1908, §2489 R. S. 1881, as applied to the facts before us, provides that when a wife dies intestate, leaving no child, but leaving a widower and a father surviving her, her property, real and personal, shall descend three-fourths to the widower and one-fourth to the father. Section 870 Burns 1908, Acts 1883 p. 61, provides that after the adoption of a child, "it shall take the name in which it is adopted and be entitled to and receive all the rights

and interest in the estate of such adopting father or mother, by descent or otherwise, that such child would if the natural heir of such adopting father or mother: Provided, however, that should such adopted child die intestate, without leaving wife or husband, issue or their descendants, surviving him or her, seized of any real estate or owning any personal property which may have come to such child by gift, devise or descent from such adopting father or mother, such property so coming to such adopted child shall, on its death, descend to the heirs of said adopting father or mother the same as if such child had never been adopted.” Section 871 Burns 1908, §826 R. S. 1881, provides that “after the adoption of such child, such adopted [adopting] father or mother shall occupy the same position toward such child that he or she would if the natural father or mother, and be liable for the maintenance, education and every other way responsible as a natural father or mother.”

The manifest purpose of the statutes relating to the adoption of children cannot be construed to impose duties

and obligations alone upon the adopting parents, but

1. should be held to establish a reciprocal relation between adoptive parents and adopted children. At common law, the adoption of children by legal process was unknown, and we have borrowed the principle of adoption, incorporated into our statutes, from the civil law, which made an adopted child the child of the adopting parent for all legal purposes; and by our statutes the legal status of an adopted child is fixed. No distinction is made between the rights of an adopted child in the estate of the adopting father or mother and a natural child.

The findings in this case disclose that the deceased wife of appellee, who was the adopted daughter of appellant, inherited from her adoptive mother, who was the wife of appellant, real estate and personal property of the value of more than \$10,000, all of which was changed from the form in which it was inherited by the intestate during her life-

time, but with the money realized from the property inherited, the intestate purchased the real estate in suit. This property, at the time of the intestate's death, was not impressed with any ancestral quality, although all the property possessed by such intestate at the time of the purchase came to her from her adoptive mother.

The immediate question for determination is, Who is meant by the father and mother, in this case? It has been held by this court that the purpose of adoption is

2. to fix the status of an adopted child as near as possible to that of a natural child, and to give it the same position in the family, together with all the rights and privileges, of a child of both the husband and wife. The name of the child is changed, its identity is merged into that of the adopting parents, and it becomes their child in all but blood. While the rule is that statutes in derogation

3. of the common law will be strictly construed, the statutes of adoption will not be so strictly construed as to defeat their purpose. *Bray v. Miles* (1889), 23 Ind.

App. 432. That courts will look to the legislative in-

2. tention in the interpretation of these statutes, abundantly appears by the decisions of the Supreme Court.

In the case of *Davis v. Krug* (1884), 95 Ind. 1, 10, it is said: "If we are right in our interpretation of the legislative intention, in the enactment of our law for the adoption of heirs, then it must be that the adopting father or mother, or his or her heirs, will inherit from the adopted child all such property, real or personal, as came to such child by gift, devise or descent, from the adopting parent or parents, whenever he, she or they would have inherited such property, if the adopted child had been the natural child of the adopting father or mother. In such case and as to such property, we are of opinion that the adopting father or mother, or his or her heirs, will inherit from the adopted child, to the entire exclusion of the natural heirs of such child."

That the equities of the case will occupy a large place in construing the statutes in question, is fully established by the opinion of Elliott, J., in the case of *Humphreys v. Davis* (1885), 100 Ind. 274, 50 Am. Rep. 788, in which it is said: "The equity of the case is with the surviving husband, and against the natural mother who gave up her child, sundering all maternal ties, and suffering a stranger to take a mother's place. The husband, who enabled his wife to acquire or preserve her property, has infinitely stronger claims than the natural mother, who cast aside her child. Rules of law are intended to secure justice, and justice requires that the husband who has maintained the wife should be preferred to the mother of a child which was the child of his wife only by adoption. Equity is natural justice, and natural affection and natural right make a strong equity in the husband's favor." Again, at page 281, it is said: "As the status of the surviving husband and adoptive father is that of father, his interest in the land which the deceased child held by virtue of the rights vested in it by adoption is that of a father, since it is of that property, as the subject, that the status of parent and child is predicated. This is a just as well as a logical result. It is not to be presumed that the legislature meant to violate logical rules by creating the legal relation of child without the corresponding one of parent, nor that they meant to thrust out the surviving husband and father for the benefit of a person that was a stranger to the ancestor who was the source of title. * * *

To produce uniformity and harmony, it must be held, as we now hold, that the death of the adoptive child casts the inheritance which came to him through the joint adoption, back to his adoptive father, and not upon the natural mother who was an utter stranger to the person from whom the title flowed."

In the case of *Paul v. Davis* (1885), 100 Ind. 422, 423, the court said: "The adoptive child does become the stirps or stock of inheritance, but to whom does it sustain this re-

lation as to property acquired by inheritance from the adoptive parents? Doubtless, this relation exists between such a child and its children; they are of the original stock of descent, for they bear the relation of grandchildren to the adoptive parents. The legal relation does not end with the death of the adoptive child, and so the line of descent goes back, in default of wife or children, to the source from which the property came. This is strictly equitable and in harmony with principle. * * * The natural mother is not of the stock from which the property came to the child which was given in adoption to others, and between her and that stock there is a gap which is not bridged by any statute or by any principle of justice. It is strictly consistent with justice, with principle and with our statutory scheme of descents, to prefer the adoptive father to the natural mother in cases where the adoptive father was of the original stock of inheritance. The natural mother is as to that stock an utter stranger, and, as to property descending from that stock, has suffered another to fully occupy the status of parent with all of its legal incidents. Where the adoptive child dies under circumstances such as would, in a similar case, cast the inheritance upon the father of a natural child, the adoptive father inherits the property which the adoptive child acquired by virtue of the status fixed by the act of adoption.”

While these cases are predicated upon a state of facts different from the facts in this case, the principle declared, that the adoptive father inherits the property of the adoptive child, acquired by virtue of the status fixed by the act of adoption, is general, and includes the case made out by this appeal.

In support of the judgment below, counsel for appellee cite the case of *Rountree v. Pursell* (1895), 11 Ind. App. 522—a case which we think was properly decided—and which was followed by the later case of *Gray v. Swerer* (1911), 47 Ind. App. 384, but both cases call for a construction of §2994

Burns 1908, §2471 R. S. 1881. These cases hold that where the intestate dies without leaving husband or wife, and without direct heirs in the ascending or the descending line, but with collateral heirs on the paternal and the maternal side, the inheritance, if it came by gift, devise or descent from the paternal line, shall go to the paternal heirs, and if from the maternal line, it shall go to the maternal heirs, but if the estate came to the intestate otherwise than by gift, devise or descent, half shall go to the paternal kindred and half to the maternal kindred. These cases further hold, that, in order to descend exclusively to the paternal or the maternal kindred, the inheritance at the time it passed to the intestate must be in specie, and descend from the intestate in the same form in which it was inherited. This rule, which requires the perfect identification of the property in order that it may pass to one line of kindred exclusively, is a wise one; for while the maternal and the paternal kindred may be of the same blood, and of equal degrees of kinship to such intestate, yet, if the inheritance clearly and unmistakably came from one line, and was not changed by the intestate during his lifetime, at his death it should pass to the line from which it came. This case does not call for a construction of §2994, *supra*.

In this case the natural parents were strangers to the blood of the woman from whom intestate inherited all that she had; and while the form of the inheritance was changed, the substance remained the same, and there was no confusion by the intermingling of the inheritance with property acquired from other sources. If, as we have seen, the statutes for the adoption of children, and the distribution of property incident to such adoption, are to be construed to secure justice, and are in favor of the strong equities of the case presented by this appeal, then we believe that in this case appellant must be deemed to be the father, as the word is used in §3027, *supra*. To hold otherwise, and to reward the natural parents by casting upon them the fruits of the

industry of strangers to their blood, and to take all interest in the property from the surviving husband of the woman who took intestate within a few days after her birth, raised her, and richly endowed her, would be violative of every principle of right and natural justice, and would be opposed to public policy, which favors natural family life, and does not favor those who seek to escape the responsibilities of parenthood. With this view of the case, we think the court erred in stating its conclusions of law.

The judgment is therefore reversed, with instructions to the lower court to restate its conclusions of law in accordance with this opinion, and for further proceedings not inconsistent herewith.

HARVEY ET AL. v. HAND ET AL.

[No. 7,460. Filed October 3, 1911.]

1. PLEADING.—*Complaints.—Demurrers.—Additional Paragraphs.—Appeal.*—On appeal, an "additional paragraph," alleging the same cause of action, filed after the sustaining of demurrers to all previous complaints and paragraphs, and after taking leave to amend, will be considered as an amended complaint, and as a waiver of all previous exceptions. p. 394.
2. PLEADING.—*Complaint.—Repetitions.*—A complaint alleging the facts constituting the cause of action in such a manner as to enable a person of common understanding to know what is intended, is sufficient as against a demurrer, though it contains many vain repetitions. p. 395.
3. PLEADING.—*Complaint.—Sufficiency.*—A complaint that entitles the plaintiff to any part of the relief prayed for is sufficient on demurrer. p. 396.
4. REFORMATION.—*Deeds.—Mistake.—Fraud.*—Equity will reform a deed whenever through a mutual mistake, or a mistake of one of the parties accompanied by the fraud of the other, it does not express the agreement of the parties. p. 398.
5. TRUSTS.—*Express.—Resulting.—Fraud.—Deeds.*—Section 4019 Burns 1908, §2976 R. S. 1881, providing, among other things, that §4017 Burns 1908, §2974 R. S. 1881, which provides that "when a conveyance for a valuable consideration is made to one person, and the consideration therefor paid by another, no use or trust shall result in favor of the latter," "shall not extend to cases * * * where * * * by agreement and without any fraud-

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ulent intent, the party to whom the conveyance was made * * * was to hold the land * * * in trust for the party paying the purchase money," does not apply to a suit to reform a deed so as to create a trust in favor of plaintiffs, for the reason that such a trust is express, the statute applying only to resulting trusts. p. 398.

6. REFORMATION.—*Contracts.—Consideration.—Deeds.—Complaint.*—A complaint to reform a deed must allege a valuable consideration for the antecedent contract, a mere volunteer being unable to maintain such suit. p. 398.
7. REFORMATION.—*Deeds.—Consideration of Antecedent Contract.—Trust.—Construction of.*—In a suit for the reformation of a deed the court will perhaps not consider the deed as reformed in order to ascertain if a valuable consideration has been yielded; but the court, in determining whether a valid and enforceable trust is created, will look to the deed as reformed. p. 399.
8. REFORMATION.—*Deeds.—Trusts.—Consideration.—Family Settlements.—Complaint.*—A complaint to reform a deed so as to show a trust therein in favor of plaintiffs, alleging a consideration of \$2,000, love and affection, and a family settlement, for the making of such deed, states a sufficient consideration. p. 400.
9. REFORMATION.—*Laches.—Notice.—Complaint.*—A complaint by the beneficiaries of an alleged trust, alleging that their father in executing a deed to their sister omitted by a mutual mistake of himself, such sister and the scrivener, to create such trust, that the father had the deed recorded at once, but did not, during his lifetime, learn of such omission, and that it was not until a short time after the father's death that such beneficiaries learned of it, sufficiently shows diligence, the rights of no third persons having intervened. p. 401.
10. REFORMATION.—*Deeds.—Statute of Frauds.*—A suit to reform a deed is not an action to enforce a parol agreement for the sale of land, and is not affected by the statute of frauds. p. 402.

From Boone Circuit Court; *Willet H. Parr*, Judge.

Suit by Stephen Harvey and another against Mary J. Hand and another. From a judgment for defendants, plaintiffs appeal. *Reversed.*

Henry C. Cox, Patrick H. Dutch and Hanly, McAdams & Artman, for appellants.

A. J. Shelby and Shirts & Fertig, for appellees.

. *HOTTEL, J.*—Suit by appellants to reform a deed made to appellee Mary J. Hand by her parents, Andrew Harvey and wife.

The deed sought to be reformed is absolute on its face, and conveys to Mary J. Hand the fee-simple title to ninety-three and one-third acres of land in Boone county, Indiana. By this suit appellants seek to reform the deed so as to make it conform to an alleged antecedent agreement between said Mary J. Hand and her parents, which appellants claim was intended to be incorporated in the deed, and by the terms of which it was agreed that such deed should convey the title to fifty-three and one-third acres of said land to Mary J. Hand in trust for these appellants, and that the grantors should retain a life estate in all the land conveyed.

The transcript contains numerous complaints—original, amended and additional—to all of which demurrers were sustained, and these rulings constitute the errors assigned.

Appellees first insist that because of these numerous complaints, and the failure of appellants properly to number their paragraphs, the record is in such a confused

1. state that no question is presented to this court as to the sufficiency of any paragraph. An examination of the record, however, leads us to a different conclusion, and one that is in accord with the second contention of appellee, namely, that "the paragraph of complaint last filed, though styled 'additional paragraph,' having been filed after demurrers were sustained to the preceding paragraphs, should be treated as an amended complaint, and as a waiver of all previous exceptions."

The transcript discloses that said several complaints and paragraphs thereof all state the same cause of action; that successive demurrers were filed and sustained to each, with no election to stand upon anyone, but with leave taken to amend before the filing of the last paragraph.

Under such circumstances, the last paragraph filed "constituted the only complaint that was then before the court, * * * and was, in legal effect, an amended complaint, without regard to the manner in which it was entitled," and the alleged errors in sustaining the demurrers to the previ-

ous complaints were waived by not electing to stand upon any one, by taking leave to amend, and by pleading further. This position of appellees is supported by authority and conceded by appellants. *Scheiber v. United Tel. Co.* (1899), 153 Ind. 609; *Hargrove v. John* (1889), 120 Ind. 285; *Hormann v. Hartmetz* (1891), 128 Ind. 353.

It is next insisted by appellees that this amended complaint is so uncertain, and contains so many repetitions, that it does not comply with the second subdivision of §343

2. Burns 1908, §338 R. S. 1881, and might have been stricken out, and that, inasmuch as the same result has been reached by the ruling on the demurrer, no available error is thereby presented.

The complaint is not a model, and violates the letter of the clause of the section of the statute referred to, in the matter of repetition, and parts of it should have been stricken out upon proper motion in the court below; but the complaint falls clearly within the requirements of the section cited, in that the cause of action attempted to be stated therein is stated "in such a manner as to enable a person of common understanding to know what is intended," and should not, on account of the infirmities mentioned, be held insufficient as against a demurrer, if it be in other respects sufficient to state a cause of action. In the prayer of this paragraph, appellants, in addition to seeking the reformation of the deed, ask that the title to the fifty-three and one-third acres be quieted. Appellees insist that the complaint is not good on this theory, and that there was no error in sustaining the demurrer thereto.

Appellants concede that the paragraph lacks the essential elements of a complaint to quiet title, and insist that it does not proceed upon that theory, but that its sole theory is the reformation of the deed in question, and that a complaint which shows that plaintiffs are entitled to some relief, though not entitled to all the relief prayed for, is sufficient.

It is clear that the controlling, if not the sole theory of

this complaint is the reformation of the deed, and appellants' position, that a complaint is sufficient if it

3. states facts that entitle the plaintiff to any relief, though not to all the relief prayed for, is abundantly supported by authority. *Shepardson v. Gillette* (1892), 133 Ind. 125; *Linder v. Smith* (1892), 131 Ind. 147; *Gowdy Gas Well, etc., Co. v. Patterson* (1902), 29 Ind. App. 261.

The only question remaining to be considered, which is the real question in the case, is whether the complaint states facts sufficient to entitle appellants to the reformation of the deed in question.

The complaint is lengthy, and we shall set out only that part necessary to an intelligent understanding of the decision of the question here involved, and the grounds on which this opinion is based. It alleges that Andrew Harvey and his daughter, Mary J. Hand, entered into an antecedent parol contract, by the terms of which the father and his wife agreed to convey to appellee Mary J. Hand the ninety-three and one-third acres of land, described in the deed; that forty acres were to be held by said appellee in her own right, and fifty-three and one-third acres, particularly set out and described in the complaint, were to be held by her in trust for appellants; that the entire tract was to be held by her subject to the life estate of the grantors; that said appellee agreed to accept such deed, and to perform the conditions. The complaint then alleges that said deed was actually executed; that by the mutual mistake of all the parties to the deed, and of the scrivener who wrote it, there was not inserted in such deed that part of said parol contract which provided that said appellee should take and hold fifty-three and one-third acres of said real estate in trust for appellants, nor that part of said contract that reserved to the grantors the life estate in said lands; that the grantors caused the deed to be recorded the day after its execution; that at the time of the execution of the deed, and until the death of Andrew Harvey, he believed and understood that such deed ex-

pressed the terms of said parol agreement; and that appellee Mary J. Hand accepted the deed, understanding and believing that it so expressed said antecedent contract, pursuant to which it was executed; that appellants did not know until after their father's death that said deed did not so express said contract entered into between him and his daughter.

Upon the subject of the relation of the parties and the consideration that entered into the making of the deed, the complaint alleges the following facts: That defendant Harvey Hand is the husband of Mary J. Hand; that plaintiffs, Stephen and Noah Harvey, are sons of Andrew Harvey, deceased; that besides the children mentioned, Malinda Dodson and George W. Harvey are the children of Andrew Harvey, but are not defendants in this suit; that Andrew Harvey died on January 4, 1905, intestate; that on August 8, 1893, said Andrew Harvey owned in fee simple 172 acres of land, situate in Boone county, Indiana, and personal property not to exceed \$300 in value; that on said day he made a division of all his land among his children—he gave to Malinda Dodson, forty acres, to George W. Harvey, forty acres, and to Mary J. Harvey, now Mary J. Hand, ninety-three and one-third acres, fifty-three and one-third acres of said ninety-three and one-third acres were given to Mary J. Hand in trust for said Stephen and Noah Harvey, and forty acres of said ninety-three and one-third acres were given absolutely to Mary J. Hand; that said Andrew Harvey was old and infirm; that plaintiffs had helped to clear said farm so deeded to decedent's children; that it was not the intention of said Andrew Harvey to make any difference among his children in the division of his estate; that plaintiffs in this suit had already paid a fair consideration for said fifty-three and one-third acres; that said Andrew Harvey, in conveying said real estate, intended that Mary J. Hand should share equally with said Stephen Harvey and Noah Harvey, and he desired to retain possession of the

rentals and profits of said lands during his life time; that the consideration for said lands was natural love and affection, together with a consideration of \$2,000, as stated in the deed.

It is well settled that the jurisdiction of a court of equity may, in a proper case, be invoked to reform and correct an instrument, and make it state correctly the true agree-

4. ment of the parties, when it fails so to do. The rule in such cases is that "equity will reform a written contract between the parties whenever, through mutual mistake, or mistake of one of the parties accompanied by the fraud of the other, it does not, as reduced to writing, correctly express the agreement of the parties." *Citizens Nat. Bank v. Judy* (1896), 146 Ind. 322, 340, and authorities cited.

Appellees insist, however, that this complaint is bad because it fails "to aver that the alleged agreement to hold in trust was without any fraudulent intent." To support

5. this position counsel cite §4019 Burns 1908, §2976 R. S. 1881, and authorities under note three thereof. This section of the statute, which makes necessary such an allegation in seeking the enforcement of a trust in certain instances, relates to a resulting trust mentioned and provided for by the statute, while the trust sought to be created by the reformation of the instrument here sought to be reformed is an express trust, created, not by operation of a statute, but by the express contract of the parties, and the statute relied upon and the authorities cited by appellees have no application.

Appellees also insist that this complaint is bad because it fails to aver "that there was any consideration moving from appellants to support the alleged trust," and that a

6. "donee or volunteer cannot set up a resulting trust and have reformation, nor in any manner secure specific performance." In suits of this character, seeking the reformation of an instrument in a court of equity, it is the

law, and so conceded by appellants, that the antecedent contract upon which the reformation is based must be founded upon a valuable consideration, and those seeking the reformation must not be mere volunteers. *Baker v. Pyatt* (1886), 108 Ind. 61, 71; *Pearson v. Pearson* (1890), 125 Ind. 341; *Peterson v. Boswell* (1894), 137 Ind. 211; *Mason v. Moulden* (1877), 58 Ind. 1; *Citizens Nat. Bank v. Judy* (1896), 146 Ind. 322.

Appellants, however, insist that the allegations of this complaint clearly show a consideration, and in this connection insist that, in considering the allegations of the

7. complaint upon this subject, we must treat the deed sought to be reformed as reformed, and that when so reformed it will show a consideration moving, not from appellee Mary J. Hand alone, but from appellants also.

While it is true that, for the purpose of determining whether the instrument sought to be reformed would, when reformed, express a valid and enforceable trust, it is proper that the instrument should be considered as reformed; yet we question whether this same rule would apply in determining whether the complaint alleged a consideration for the trust, in the absence of any allegation in the pleading, or the unreformed instrument showing any consideration moving from the plaintiffs, and in the absence of a showing in the complaint of any relation between the parties tending to support such consideration. In determining the validity of the trust created by the reformation, it is proper to consider the instrument as reformed, because the theory of the suit makes its validity rest upon the reformation, and the complaint in such cases is required to allege the antecedent agreement upon which the reformation is predicated.

No such reason exists for reading into the instrument such reformation in determining whether the complaint alleges a consideration for the estate, or interest in the land, sought to be created by the reformation, but in view of the other

allegations of this complaint we deem it unnecessary to decide this question.

In addition to the consideration of \$2,000, expressed in the deed, a copy of which is made a part of the complaint,

it is alleged there was the further consideration of

8. love and affection, and that appellants had helped to clear the farm, and that they had already paid a consideration for said deed.

There are allegations also that show that the making of this deed was a part of a family agreement and settlement. As throwing light upon the force and effect that should be given to these allegations in determining the sufficiency of the complaint upon this question, we quote from 12 Am. and Eng. Ency. Law (2d ed.) 875, which has been frequently quoted with approval by our Supreme Court: "Family agreements and settlements are treated with especial favor by the courts of equity, and equities are administered in regard to them which are not applied to agreements generally, and this on the ground that the honor and peace of families make it just and proper to do so." See, also, *Emmons v. Harding* (1904), 162 Ind. 154; *St. Clair v. Marquell* (1903), 161 Ind. 56; *Baker v. Pyatt, supra*; *Wright v. Jones* (1886), 105 Ind. 17, 27.

"A deed by a father to a son in consideration of services already rendered and love and affection may be reformed. * * * 'It is settled that equity will not intervene for the reformation of a deed which is purely voluntary, resting upon no valuable consideration whatever. * * * On the other hand, if there is any valuable consideration, no difference how small, supplemented by the consideration of love and affection, a mistake in a deed may be reformed.' [*Baker v. Pyatt* (1886), 108 Ind. 61.]" *Citizens Nat. Bank v. Judy, supra*. See, also, *Mason v. Moulden, supra*; *Baker v. Pyatt, supra*.

The language of the court on page 64 of the last case cited is applicable and controlling in this case. It is as fol-

lows: "So far as the conveyance was based upon love and affection, it may be said to have been a gift, but there is a positive averment that the conveyance was made not only in consideration of love and affection, and by way of dividing the land among the children, but also in consideration of \$2,600 paid to the grantor. The averments taken together, we think, are sufficient upon the subject of consideration to make the paragraph good as against the demurrer."

These authorities make clear the fact that the allegations of the complaint in this case upon the subject of a consideration are sufficient.

Appellees' next objection to the complaint is that it shows such a lapse of time between the making and the recording of the deed and the bringing of this suit that the

9. cause of action, if any ever existed, has been lost by laches. It must be remembered, however, in this connection, that the complaint also alleges, in substance, that by the terms and provisions of the antecedent parol contract, which it is alleged should have been carried into the deed, the grantor was to retain a life estate in all said real estate conveyed, and the appellants' interest therein was postponed until his death; that said deed was placed of record, with the understanding and belief by all interested therein that all the terms of said parol contract had been carried into said deed; that said grantor did not die until January 4, 1905; that appellants did not know until after his death that such deed did not contain the provisions of said parol contract; that when such alleged omission was brought to their attention, demand was made of appellee Mary J. Hand that she carry out said contract, and she refused.

It should be added, also, that so far as the allegations of this complaint show, the situation of said appellee has in no sense changed during this period. The interest of no third party has intervened. Said appellee has not, by the

delay, been induced to incur any expense on the land, or to do anything to her detriment, but the delay has been to her benefit, rather than to her injury.

While it is true that "equity aids the vigilant, not those who slumber on their rights" (1 Pomeroy, Eq. Jurisp. [3d ed.] p. 695), yet courts of equity have not fixed and cannot fix any definite or specific periods of delay, that, like the statutes of limitations, bar the right to relief in such courts, and each particular case must be determined from its own facts and circumstances; "but in every case, if an argument against relief, which would otherwise be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defense must be tried upon principles substantially equitable." *Citizens Nat. Bank v. Judy*, *supra*. See, also, *Lindsay Petroleum Co. v. Hurd* (1874), L. R. 5 P. C. 221; *Earl v. Van Natta* (1902), 29 Ind. App. 532; *Koons v. Blanton* (1891), 129 Ind. 383, 387, 389.

The application of the principles announced in these cases relieve the complaint in this case from the charge that it shows upon its face such laches as amounts to a defense to the cause of action otherwise stated therein.

Lastly, appellees insist that this complaint is bad, because it makes a case within the statute of frauds. This is not a suit to enforce a parol contract for the sale of real estate, or any interest therein, but is an action so to reform a written contract that it will contain and express that which was agreed upon and intended by the parties. In such case the contract is to all intents and purposes written, and "equity deems as done that which the parties to the contract had agreed and intended to do." *Citizens Nat. Bank v. Judy*, *supra*. Under this rule and the allegations of this complaint the deed in question should have contained, and in equity does contain, an express grant to appellee Mary J. Hand of fifty-three and one-third acres of the land conveyed by said deed, to have and to hold said

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land in trust for appellants. This is an express trust in writing, in no manner affected by the statute of frauds.

The statute of frauds "does not apply to the correction of mistakes in description" in written instruments. *Morrison v. Collier* (1881), 79 Ind. 417, 421.

We think the amended complaint in this case contains all the essential elements of a complaint for the reformation of a written instrument, and that the demurrer thereto should have been overruled.

Judgment reversed, with instructions to the court below to overrule the demurrer to the last amended complaint entitled "Additional Paragraph of Complaint," and for further proceedings in accordance with this opinion.

THOMAS v. MCCOY ET AL.

[No. 7,044. Filed October 4, 1911.]

1. **NEW TRIAL.—Statutory.—When Demandable.—How Determined.**—Whether a new trial as a matter of right is demandable in a given case is determined by a consideration of the issues therein prosecuted to final judgment. p. 404.
2. **EASEMENTS.—Rights of Way.—Implied Grants of.—Complaint.**—A complaint alleging that plaintiff's joint grantors conveyed to him a tract of land having no outlet except over their retained land, and that subsequently they conveyed such retained land to defendants, shows that the plaintiff's deed carried with it an implied grant of a way as of necessity over defendants' land. p. 404.
3. **EASEMENTS.—Servient Estates.—Subsequent Grantees.**—Subsequent grantees of land burdened with an easement take such land subject thereto. p. 405.
4. **EASEMENTS.—Character of Estate.—Extinguishment.**—A right of way over land constitutes an interest therein; and such interest, whether acquired by adverse use, or by express or implied grant, can be extinguished only in a mode recognized by law. p. 405.
5. **NEW TRIAL.—Statutory.—Easements.**—In a suit to confirm a right of way as of necessity a new trial as a matter of right is demandable. p. 406.

From Jay Circuit Court; *John F. LaFollette*, Judge.

Thomas v. McCoy—48 Ind. App. 403.

Suit by Harvey Thomas against Ellen McCoy and others. From a judgment for defendants, plaintiff appeals. *Reversed.*

Frank H. Snyder and Whitney E. Smith, for appellant.
David T. Taylor and Frank M. Hughson, for appellees.

MYERS, J.—On September 5, 1905, appellant commenced this suit against appellees, to confirm a way of necessity across appellees' land. The issues submitted to the court for trial were formed by a complaint, answered by (1) a general denial, (2) the fifteen-year statute of limitations, (3) former adjudication. There was a reply in denial. A trial resulted in a finding and judgment in favor of appellees.

Appellant's motion for a new trial as of right was overruled, and on this ruling is based the only error here assigned. As this case comes to us, our inquiry is limited to the question, Was appellant entitled to a new trial as of right? This question must be answered from an examination of the issues prosecuted to final judgment.

1. ited to the question, Was appellant entitled to a new trial as of right? This question must be answered from an examination of the issues prosecuted to final judgment.

The complaint shows that appellant is the owner of the northeast quarter of the southwest quarter of a certain section of land in Jay county, and that appellees own
2. the north half of the southeast quarter of the same section; that on September 14, 1883, Leander D. Small and Jay B. McIntyre were the joint owners of said tracts, and on that day by deed conveyed to appellant the parcel now owned by him, retaining the tract that they thereafter sold and conveyed, and which is now owned by appellees; that appellant's land, which is valuable for agricultural purposes, is completely surrounded by the lands of other persons, and is one-quarter of a mile from any public highway, without a road or way leading to any highway; that the most direct outlet from his land to a public highway is east across the adjoining land of appellees, that abuts

on a highway; that appellant, in writing, requested appellees to mark out a way over their land for his use, which was refused, and on August 28, 1905, appellant located, marked out and described a way one rod wide along the south side of appellees' land, and notified them of his action in that regard; that appellees refused and still refuse to permit him to pass over their land to said highway.

The facts exhibited by the complaint—the substance of which we have set out—show that appellant's deed from Small and McIntyre, by operation of law carried with it an implied grant of a way as of necessity to a public highway over the land retained by them. *Ritchey v. Welsh* (1898), 149 Ind. 214, 40 L. R. A. 105. As was said in the case of *Logan v. Stogsdale* (1890), 123 Ind. 372, 8 L. R. A. 58: "The theory is that where land is sold that has no outlet, the vendor grants one over the parcel of which he retains the ownership." Appellees occupy the position of

3. appellant's grantors; and as the law implied a grant at the time the common grantor conveyed to appellant, and as that grant was prior to the regular chain of conveyances which passed the title to the land in question to appellees, the latter must carry into effect their predecessors' implied grant. *Logan v. Stogsdale, supra*; *Ritchey v. Welsh, supra*; *Taylor v. Warnaky* (1880), 55 Cal. 350; *Nichols v. Luce* (1834), 24 Pick. (Mass.) 102, 35 Am. Dec. 302. A right of way over land is an interest therein (*Indiana, etc., R. Co. v. Allen* [1888], 113 Ind. 581, 591), and whether such right be acquired by adverse use, or by express or implied grant, it cannot be extinguished ex-

4. cept in a mode recognized by law. Appellant shows that a way of necessity exists in his favor, which is denied by the owners of the servient estate, thereby tendering an issue involving the right of appellant to a separate and independent interest in the land. This right was directly in question, and was necessarily adjudicated.

In the case of *Morgan v. Moore* (1855), 3 Gray 319, 322, it

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was said: "The right to a fee, and the right to an easement in the same estate, are rights independent of each other, and may well subsist together, when vested in different persons. Each can maintain an action to vindicate and establish his right; the former to protect and force his seizin of the fee; the latter to prevent a disturbance of his easement."

In the case of *Davidson v. Nicholson* (1877), 59 Ind. 411, it was held that a suit would lie to quiet title to an easement, and the court quoted with approval the lan-

5. guage we have taken from the case of *Morgan v.*

Moore, *supra*. See, also, *McAllister v. Henderson* (1893), 134 Ind. 453, 460. Section 1110 Burns 1908, §1064 R. S. 1881, allows to the losing party in a suit to quiet title to an interest in real estate a new trial as of right, and the following cases were held to be within this statute. To establish title to land: *Shucraft v. Davidson* (1862), 19 Ind. 98; to revest title in an owner whose land had been obtained from him by fraud: *Warburton v. Crouch* (1886), 108 Ind. 83; by parties, not creditors, setting a deed aside to recover land: *Anderson v. Anderson* (1891), 128 Ind. 254; "by heirs at law to set aside a deed of their ancestor, and praying to quiet their title to the lands:" *Physio-Medical College v. Wilkinson* (1883), 89 Ind. 23; "to annul a conveyance and revest the title in an owner who had been induced to part with it by imposition and fraud:" *Tomlinson v. Tomlinson* (1904), 162 Ind. 530; by a lessee for the recovery of a leasehold interest in lands: *Campbell v. Hunt* (1885), 104 Ind. 210.

The case at bar calls for the adjudication of a right of way acquired by grant over land, and is, therefore, within the statute authorizing a new trial as of right.

Judgment reversed, with instructions to sustain appellant's motion, and grant him a new trial.

CHICAGO AND ERIE RAILROAD COMPANY v.
KIRACOFE.

[No. 7,150. Filed October 4, 1911.]

1. MASTER AND SERVANT.—*Railroads.—Defective Pilots.—Negligent Orders.*—A complaint by a railroad brakeman, alleging that defendant railroad company's locomotive engineer directed him to go upon the pilot of the engine and to flag a certain approaching train, that such pilot was defective, of which defendant had knowledge and plaintiff had not, and that under the weight of his body it broke, injuring him, is sufficient when attacked for the first time on appeal, the rule being that if there is not a total failure to allege some material fact, the complaint will be sufficient, all intendments being in its favor. p. 408.
2. MASTER AND SERVANT.—*Railroads.—Defective Pilots.—Interrogatories.—Verdict.*—In an action by a brakeman for injuries received because of an alleged defective pilot, on which he was riding by order of his locomotive engineer, answers to interrogatories that the plaintiff went through the cab window and upon the pilot while the engine was moving, that the nose of the pilot struck a rail at a crossing and was broken, that it did not fall by reason of plaintiff's weight as alleged, that the plaintiff was ordered by the locomotive engineer to flag an approaching train and that the plaintiff could not do so without riding on such pilot, and that he had been furnished a book of rules, which he had agreed to study, are not irreconcilable with a general verdict for plaintiff. p. 409.
3. MASTER AND SERVANT.—*Contributory Negligence.—Riding upon Engine Pilot.—Jury.*—Whether a brakeman was guilty of contributory negligence in riding, under the order of his locomotive engineer, upon the pilot of an engine in order to flag an approaching train, is a question for the jury. p. 410.
4. MASTER AND SERVANT.—*Railroads.—Rules.—Breach.—Emergencies.—Instructions.*—Where defendant railroad company requested an instruction that if the company laid down rules and put them into the hands of the plaintiff brakeman, it was his duty to obey them, the court's modification of such instruction by adding thereto that if conditions arose where the rules could not be followed, it was the brakeman's duty to take such steps as ordinarily prudent men would take to prevent loss of life, or property, was warranted. p. 410.
5. MASTER AND SERVANT.—*Railroads.—Brakemen.—Riding upon Pilot.—Instructions.*—In an action by a brakeman for injuries sustained while riding upon the pilot of an engine at the com-

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mand of his locomotive engineer for the purpose of flagging an approaching train, a requested instruction that under such circumstances he could not recover, was properly refused, the question of contributory negligence in such case being for the jury. p. 411.

6. **MASTER AND SERVANT.—Assumption of Risk.—Instructions.**—An instruction that does not purport to enumerate the elements essential to a recovery, by a brakeman, for injuries sustained, is not bad for failure to include the element of assumption of risk, the jury having theretofore been fully instructed on such point. p. 411.

From Huntington Circuit Court; *Samuel E. Cook*, Judge.

Action by Alvin R. Kiracofe against the Chicago and Erie Railroad Company. From a judgment for plaintiff, defendant appeals. *Affirmed.*

W. O. Johnson and Kenner, Lucas & Kenner, for appellant.

Lesh & Lesh, for appellee.

FEIT, P. J.—Appellee recovered judgment for \$100 against appellant for personal injuries.

The assignments are as follows: (1) The complaint does not state facts sufficient to constitute a cause of action; (2) the court erred in overruling appellant's motion for judgment on the answers to the interrogatories notwithstanding the general verdict; (3) the court erred in overruling appellant's motion in arrest of judgment; (4) the court erred in overruling the motion for a new trial.

The complaint alleges, in substance, that on and prior to November 8, 1907, appellee was in the employ of appellant

as a brakeman; that as such brakeman he was subject

1. to the order of the engineer of the train upon which he worked, and it was his duty to obey such orders; that on said day, while so employed, he was directed by said engineer to go upon the pilot of his engine, and flag train No. 9; that, pursuant to such order, he went upon the pilot; that the timbers of said pilot were rotten and defective, and while appellee was upon said pilot, for the purpose afore-

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said, the timbers and braces gave way from the mere weight of appellee's body, and caused him to fall; that in order to avoid being run over, he threw himself from the track, and in so doing, and without any fault on his part, he caught his hand and injured two of his fingers; that said injuries were caused wholly by the negligence of appellant in failing properly to inspect said engine and said pilot, and in failing to provide a pilot to said engine sufficient to bear the weight of any employe of said company whose duty required him to ride thereon, and in failing to provide the crew of said train—of which appellee was a member—with reasonably safe machinery and appliances—particularly the pilot of the engine—with which to perform the work required of it in the discharge of its duties; that prior to the time appellee received his said injury he had no knowledge of the defective condition of said pilot.

Where the sufficiency of a complaint is not questioned until after verdict (assignments of errors one and three), all intendments are in favor of the pleading. If there is not a total failure to state some essential element of the right of recovery, and the complaint states facts sufficient to bar another action for the same cause, the verdict cures all other defects, and is sufficient to sustain the judgment. *Oliver Typewriter Co. v. Vance* (1911), *ante*, 21; *Scott v. Collier* (1906), 166 Ind. 644. Tested by this rule, we think the complaint clearly sufficient, even if insufficient as against a demurrer, which we do not determine.

The jury, in answer to interrogatories, found that the engineer and conductor had written orders that were read by appellee; that appellee went through the cab window
2. and climbed down upon the pilot while the engine was moving; that the nose of the pilot struck the west crossing rail of the Lake Erie and Western railway tracks, and the pilot was broken; that it was not constructed of solid oak, firmly bolted and fastened to the engine; that it did not fall by reason of appellee's weight; that the engi-

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neer told appellee to flag No. 9, and he could not, at the time, pass through the gangway with safety, for the purpose of flagging the train; that when appellee entered appellant's employ he was given a book of rules that explained his duties, and he agreed to study them; that appellee's train arrived at Kingsland at 7.52 o'clock, that it required ten minutes to clear the siding, and that No. 9 was to leave Kingsland at 8 o'clock. These answers are not in such conflict with the general verdict as to overcome it, and entitle appellant to judgment thereon.

It is true that many cases hold that to ride upon a pilot, without apparent necessity for so doing, is negligence that will preclude a recovery; but where an employe is

3. acting in an emergency, under orders he is bound to obey, whether his act in so doing constitutes contributory negligence, which will defeat a recovery in case of an injury, is a question of fact to be determined by the jury, from the evidence. *Baltimore, etc., R. Co. v. Slaughter* (1906), 167 Ind. 330, 7 L. R. A. (N. S.) 597, 119 Am. St. 503; *Baltimore, etc., R. Co. v. Leathers* (1895), 12 Ind. App. 544; *Filer v. New York Cent. R. Co.* (1872), 49 N. Y. 47, 10 Am. Rep. 327; *Kane v. Northern Cent. R. Co.* (1888), 128 U. S. 91, 32 L. Ed. 339, 9 Sup. Ct. 16; *Warden v. Louisville, etc., R. Co.* (1891), 94 Ala. 277, 10 South. 276, 14 L. R. A. 552; 4 Thompson, Negligence (2d ed.) §§4731-4752.

Appellant requested the court to give the following instruction: "I instruct you that if the railway com-

4. pany laid down rules, and put them into the hands of the plaintiff, it was his duty to obey those rules in the discharge of his duties."

The court refused the instruction, and gave the following: "I instruct you that if the railway company laid down rules, and put them into the hands of the plaintiff, it was his duty to obey those rules in the discharge of his duties, but if conditions arise when the rules cannot be followed, then it is the duty of the employe to take such steps as an ordinarily

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prudent man would take to prevent loss of life or destruction of property.”

The instruction given by the court, when fairly construed, is supported by authority. The one refused states the same rule without any qualifications, and, as applied to the facts of this case, the court was warranted in refusing it. *Cleveland, etc., R. Co. v. Gossett* (1909), 172 Ind. 525; *Diamond Block Coal Co. v. Cuthbertson* (1906), 166 Ind. 290.

The court was also asked to instruct the jury, that if a railroad brakeman rides on the pilot of an engine and is injured, he cannot recover damages, even though he

5. may have been ordered to such place by a superior, whose orders he was bound to obey. This instruction was properly refused. While, as a general proposition, riding upon the pilot of an engine shows negligence on the part of the one so doing, it is not true in every case; and, on the facts of this case, it was a question for the jury to determine from the evidence, and not a pure question of law to be declared by the court. *Cleveland, etc., R. Co. v. Gossett, supra*; *Baltimore, etc., R. Co. v. Leathers, supra*; *Gulf, etc., R. Co. v. Knox* (1901), 25 Tex. Civ. App. 450, 61 S. W. 969.

Objection is made to instruction three, tendered by appellee and given by the court. In said instruction there is no attempt to enumerate the elements essential to a re-

6. covery, but to instruct the jury as to the duty of the railway company to inspect its engines. The objection urged is that it fails to include the doctrine of assumed risk; but as the court fully instructed the jury as to the assumption of risk by an employe, the objection cannot be sustained, for the error, if any, was harmless.

On the whole, the instructions given stated the law fully and fairly to both parties, and the motion for a new trial was properly overruled.

Judgment affirmed.

APPELLATE COURT OF INDIANA,

Yer Bros. Coffee, etc., Co. v. Pauley—48 Ind. App. 412.

MEYER BROTHERS COFFEE AND SPICE COMPANY v. PAULEY.

[No. 7,311. Filed October 4, 1911.]

EAL.—Weighing Evidence.—The Appellate Court will not
conflicting evidence. p. 413.

**ERY STABLE KEEPERS.—Animals.—Care of.—Compensation.—
nce.—Contracts.**—Where a judgment was rendered in favor
defendant livery stable keeper on his counterclaim alleging
the plaintiff agreed to pay the regular price for board for
horse cared for by defendant, and there was no evidence
ng to show such regular price, the judgment is not sup-
d by the evidence. p. 413.

a Superior Court of Marion County (75,481); *Vinson*
Judge.

on by the Meyer Brothers Coffee and Spice Company
; Harry H. Pauley. From a judgment for defendant,
ff appeals. *Reversed.*

ies B. Clarke, Walter C. Clarke and Clement M. Hold-
for appellant.

Miller, for appellee.

y, C. J.—Appellant purchased for \$115 a horse from
e, who was in the livery business in the city of Indian-

Appellant used the horse in its business for some
when it became lame, and the humane officers notified
nt not to work the animal any longer. Thereupon
nt returned the horse to appellee, and demanded a
of the purchase price, on the ground that appellee
presented the horse to be sound, when, in fact, it had
se known as ring-bone, which resulted in lameness.
ndered it of little value. Appellee refused to return
chase price, but the horse was left at his livery stable,
it was fed and cared for until January 18, 1907, at
time appellee sold it for \$75, and gave appellant credit
t amount on the bill for board.

Meyer Bros. Coffee, etc., Co. v. Pauley—48 Ind. App. 412.

This action was brought by appellant to recover the purchase price of the horse, on the theory that the contract of sale was tainted with fraud, and had been rescinded on that ground. Appellee filed a general denial to the complaint, and also filed a counterclaim, in which he demanded judgment for \$158, for board and care of the horse during the time it remained at his livery stable. To this counterclaim there was a general denial. No question is presented as to the form or sufficiency of the pleadings. The case was tried by the court, and resulted in a judgment for \$78.90 in favor of appellee on his counterclaim.

Appellant seeks a reversal, on the ground that the evidence is insufficient to sustain the judgment. Upon the issues of fraud and rescission, presented by the com-

1. plaint and the answer thereto, the evidence is conflicting, and, therefore, the findings of the trial court cannot be disturbed on appeal. This is conceded by appellant; but it contends that the evidence is insufficient to sustain the judgment in appellee's favor, which is

2. based on the allegations contained in the counterclaim, that appellant was indebted to appellee in the sum of \$158.90 for boarding and shoeing the horse, and for horse hire furnished at the special instance and request of appellant. The evidence shows that the horse was at appellee's livery stable from May 1, 1906, to January 18, 1907, and that appellant agreed to pay the regular board for him; but there is no evidence that appellant agreed to pay any particular price for board, or any evidence showing or tending to show what it was reasonably worth to board and care for a horse at a livery stable in Indianapolis during the time this horse was so boarded. If there was any evidence showing or tending to show the usual price paid for boarding horses in Indianapolis at the time, the judgment could be sustained; but in the absence of such evidence we are compelled to reverse it. Counsel for appellee has failed to call our atten-

tion to any evidence upon this branch of the case, and we have carefully searched the record in a vain attempt to discover such evidence.

The motion of appellant for a new trial should have been sustained. The judgment of the trial court is therefore reversed, with directions to grant a new trial.

DEARING, EXECUTOR, v. COULSON.

[No. 7,252. Filed October 5, 1911.]

1. **APPEAL.—Weighing Evidence.—Excessive Recovery.**—Where the evidence as to the value of services is conflicting the Appellate Court will not disturb the decision of the trial court. p. 415.
2. **WITNESSES.—Competency.—Decedents' Estates.—Claimants.—Testimony of.—Abuse of Discretion.**—Under §526 Burns 1908, Acts 1883 p. 102, providing that in claims against decedents' estates, the court "may, in its discretion, require any party to a suit or other person to testify, and any abuse of such discretion will be renewable [reviewable] upon appeal," a trial judge's direction for a claimant to testify in her own behalf, is reviewable for an abuse of discretion; but each case should be decided upon its own merits. p. 415.
3. **EXECUTORS AND ADMINISTRATORS.—Claimants.—Permitting to Testify.—Discretion.—Abuse.**—In an action by a claimant against an executor for services rendered to the testatrix, the trial court's direction that the claimant testify does not constitute an abuse of discretion, where the trial was by the court and where a witness had already testified that the testatrix had said that the claimant, at the death of the testatrix, was to receive for her services certain property. p. 416.

From Pike Circuit Court; *E. A. Ely*, Judge.

Action by Ella Coulson against William P. Dearing, as executor of the last will of Amanda Helsley, deceased. From a judgment for plaintiff, defendant appeals. *Affirmed.*

W. D. Curll and *Richardson & Taylor*, for appellant.
Ely & Greene, for appellee.

ADAMS, J.—Appellee filed her claim for \$1,411, against the estate represented by appellant. The claim was for

personal services, alleged to have been rendered by appellee to appellant's testatrix, and to have been rendered pursuant to an agreement with the testatrix that she would pay appellee for the services agreed upon by devising to her a certain ten-acre tract of land; that the services were of the value of \$1,411, and had been rendered pursuant to such agreement; that the testatrix had not complied with said agreement, and had not devised to appellee said real estate. The cause was submitted to the court for hearing, which resulted in a finding and judgment for appellee in the sum of \$600.

A motion for a new trial was filed and overruled, and this constitutes the only error assigned in this court. The motion for a new trial was on the grounds that the court erred in requiring and permitting the claimant to testify as a witness, that the amount of recovery is too large, and that the decision of the court is not sustained by sufficient evidence and is contrary to law.

The testimony given in the case was oral, and, to some extent, conflicting; but it was clearly established by all the evidence that appellee had rendered some service to

1. the testatrix, and that said service had some value.

We cannot weigh the evidence on appeal in a case of this kind on the ground that the recovery was excessive, and was not sustained by the evidence. We cannot say that the court erred in overruling the motion for a new trial on such grounds.

The important question, however, raised by the motion for a new trial, and the question argued at length by counsel on both sides, relates to a review of the discretion of

2. the trial court exercised in requiring appellee to testify in the case. The record shows that the court of its own motion required the claimant to testify. By §526 Burns 1908, Acts 1883 p. 102, in a case of this kind, the court "may, in its discretion, require any party to a suit or other person to testify, and any abuse of such discretion

will be renewable [reviewable] upon appeal." Prior to 1883 the action of the court in exercising the discretion of requiring a party to testify in such cases was not subject to review. *Perrill v. Nichols* (1883), 89 Ind. 444. The present statute, however, expressly provides for the review of the discretion exercised by the trial court, and it becomes the duty of the court on appeal to examine into the circumstances under which the discretion was exercised. It has been held that every case, wherein the discretion has been exercised, must necessarily be determined on its own merits, and no general rule that would be applicable in all cases can be laid down. *Talbott v. Barber* (1894), 11 Ind. App. 1, 12, 54 Am. St. 491; *Willits v. Schuyler* (1891), 3 Ind. App. 118; *Forgeron v. Smith* (1885), 104 Ind. 246.

If, as we have seen, every case, in which the court has exercised a discretion in requiring a party to testify, must be determined on its own merits, and no general rule

3. can be laid down with reference thereto, the abuse of that discretion must be very palpable to warrant a reversal on that ground alone. Especially is this true in cases submitted, as this case was, to the court, which is the conservator of estates within its jurisdiction, and is in a peculiarly favorable position to pass on the fairness and justice of exercising such discretion. In the case of *Talbott v. Barber, supra*, this court indicated that there could be no abuse of discretion in requiring a party to testify, after a *prima facie* case had been made out by the testimony of other competent witnesses. In the case of *Jonas v. Hirshberg* (1907), 40 Ind. App. 88, this court indicated that where there is indefinite evidence of the terms of an alleged written contract, it is an abuse of discretion for the court to require the party most interested to testify to the contents of the alleged written agreement. The important element in this case is to establish the agreement of the testatrix to devise real estate in payment of the services of appellee. If this agreement is not established, then no recovery can be had in any

amount, as the claim is shown to be barred by the statute of limitations.

Before appellee was called by the court in this case, Lydia Willis, a competent witness, had testified that she was in the home of testatrix eight weeks after appellee commenced work, and that testatrix, in speaking of appellee and of her excellent qualities as a housekeeper, said to the witness that she intended "to will her [appellee] ten acres, including the orchard, house and barn," for doing her work. While this is not absolute proof of an agreement, it is a strong circumstance indicating that such agreement had been made, and we think warranted the court in requiring appellee to give her version of the contract. If there was anything in the testimony of appellee, or in her manner of testifying, that raised a doubt as to her candor and truthfulness, the court would naturally exclude her evidence from consideration. That the court did not wholly rely on the testimony of appellee, is shown by the fact that the recovery is less than fifty per cent of the demand, and was clearly predicated upon the evidence of others, who testified as to the extent and value of the service.

Finding no reversible error in the record, the judgment is affirmed.

PERPETUAL BUILDING, LOAN AND SAVINGS ASSOCIATION v. STILLER ET AL.

[No. 7,455. Filed October 5, 1911.]

1. *APPEAL—Transcript.—Failure to Index.*—Appellant's failure to index its transcript so as to show the initial pages of the questioned paragraphs of answer and the demurrers thereto, constitutes a waiver of any alleged errors thereon. p.418.
2. *APPEAL.—Failure to Index Transcript.—Dismissal.*—The failure of appellant to index its transcript, after notice of the defect, warrants a dismissal of the appeal; and for such defect the court may dismiss such appeal on its own motion. p.419.

Perpetual Bldg., etc., Assn. v. Stiller—48 Ind. App. 417.

3. APPEAL.—*Weighing Evidence.—Right Result.*—The Appellate Court will not weigh conflicting evidence, and will affirm the judgment appealed from where a right result was reached on the merits. p. 419.

From Jasper Circuit Court; *Charles W. Hanley*, Judge.

Suit by the Perpetual Building, Loan and Savings Association against Bert E. Stiller and another. From a judgment for defendants, plaintiff appeals. *Affirmed.*

Foltz & Spitler, for appellant.

Abraham Halleck and *Jasper Guy*, for appellees.

HOTTEL, J.—This is a suit by appellant against appellees, on a promissory note for \$400, and to foreclose a mortgage on real estate given to secure said note. There was a judgment for appellees for costs. The complaint is in one paragraph, to which each appellee filed his separate answer, denying the execution of the note and mortgage. Appellees also filed joint answers, designated as paragraphs three, four and five. Demurrers were filed by appellant to each paragraph of answer, which demurrers were overruled, and exceptions saved.

The errors assigned call in question the action of the court in overruling the demurrers to the third, fourth and fifth paragraphs of answer, and in overruling the motion for a new trial; but appellant has in its brief urged only the insufficiency of the third and fifth paragraphs.

Appellant has deprived itself of a consideration of the question presented by the demurrers to these paragraphs of answer, by failing to comply with that part of rule

1. three of this court which requires an “index referring to the initial page * * * of each pleading, exhibit and other paper in the record, such index to form the first page of the transcript.” This rule, so far as it applies to the pleadings, has been entirely disregarded, and the only index found in the transcript is an index of the evidence, attached to the bill of exceptions near the middle of the

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record. The rule is positive and of long standing, and its observance has been held imperative by this court and the Supreme Court. *State, ex rel., v. Lankford* (1902), 158 Ind. 34; *Dixon v. Poe* (1902), 158 Ind. 54; *McCormick, etc., Machine Co. v. Hinchman* (1906), 37 Ind. App. 83; *Peterson v. Union Trust Co.* (1903), 160 Ind. 700; *Whinrey v. Starr* (1905), 35 Ind. App. 623.

If appellees had, in their brief, urged a dismissal of the appeal, because of appellant's failure to comply with said rule, and appellant, after having its attention called

2. to such an omission, had failed, as it has, to make any effort to correct or supply such omission before the cause came up for decision, there would be, under the authorities cited, nothing for this court to do but to dismiss the appeal; and we may add, that said authorities warrant this court in entering such dismissal on its own motion. But appellees make no insistence upon dismissal, and appellant has, by said index attached to its bill of exceptions, made an effort to comply with said rule, so far as it applies to an index of the evidence, and has also set out in its brief a copy of the complaint, and its exhibits, together with each defendant's answer of *non est factum* and plea of payment, the motion for a new trial, and the substance of the evidence. The sufficiency of these pleadings is, in effect, admitted by each party, respectively, and the correctness of the motion for a new trial, and of the statement of the evidence set out in said brief, is not questioned.

For the reasons indicated, instead of dismissing the appeal, we have examined the several grounds of the motion for a new trial, and this examination, together with a

3. careful review of the evidence in the case, convinces us that the motion presents no reversible error, and that the evidence is entirely sufficient to sustain the decision of the court upon the issues tendered by the complaint, said answers of *non est factum* and plea of payment and the de-

nial thereof, and that a correct decision upon the merits of the cause has been reached by the court below. The judgment is affirmed.

ITTENBACH ET AL. v. THOMAS, ADMINISTRATRIX.

[No. 7,297. Filed October 6, 1911.]

1. **TRIAL.—Interrogatories.—Verdict.—Appeal.**—In determining whether the answers to the interrogatories to the jury overturn the general verdict the court on appeal will consider only such interrogatories and answers, the general verdict and the pleadings. p. 426.
2. **TRIAL.—General Verdict.—Presumptions.**—The general verdict is presumed to be a finding for the prevailing party on every fact in issue. p. 426.
3. **TRIAL.—General Verdict.—Interrogatories.**—The general verdict controls answers to the interrogatories unless such answers are irreconcilable therewith on any supposable evidence within the issues. pp. 427, 434.
4. **TRIAL.—Verdict.—Interrogatories.—Conflict on Certain Issues.**—Where the answers to the interrogatories to the jury are in irreconcilable conflict with the general verdict upon some of the issues, the general verdict must stand, if at all, upon the remaining issues. p. 427.
5. **MASTER AND SERVANT.—Defective Machinery.—Interrogatories.**—In an action by the administrator of a deceased servant against his master, the first paragraph of complaint alleging negligence in providing a crane with old and rotten rails to rest the cab upon, and in providing weakened and crystallized hog chains for lifting the loads, answers to interrogatories to the jury that the death was caused solely by the crystallization and breaking of the hog chain, and that the crystallization thereof was undiscoverable by the use of ordinary care, are irreconcilable with a general verdict for the plaintiff on such issues. pp. 427, 429.
6. **MASTER AND SERVANT.—Defective Machinery.—Inspection.**—It is a master's duty to make inspection of machinery, for ascertaining any defects therein produced from any cause, but a failure to discover defects that are not discoverable by the use of ordinary care does not constitute negligence. p. 429.
7. **MASTER AND SERVANT.—Defective Machinery.—Interrogatories.**—In an action by an administratrix for the death of her decedent caused by the alleged negligence of defendant in providing a crane with hog chains negligently adjusted so that one chain bore

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the entire load and the consequent breaking thereof, answers to the interrogatories to the jury that the chain broke because of the improper adjustment, that there was nothing to indicate that the chain was insufficient to carry the load placed upon it and that decedent was in a better position than any one else to ascertain whether any particular chain should be tightened or slackened are not irreconcilable with a verdict for the plaintiff as to such issue, since evidence was admissible to show that the decedent was away when the adjustment was made and had just returned and knew nothing thereof. pp. 430, 434.

8. MASTER AND SERVANT.—*Instructions.—Essentials for Recovery.—Omission of Material Fact.*—In an action by the personal representative of a decedent against the defendant for negligence causing the death of said decedent, an instruction purporting to set out all the facts essential to plaintiff's right of recovery, but which omits the decedent's want of notice, actual or constructive, of the alleged defect in the machinery causing his death, is fatally erroneous, and cannot be cured by other instructions announcing the correct rule. p. 435.

From Superior Court of Marion County (74,345); *James M. Leathers*, Judge.

Action by Abbie J. Thomas, as administratrix of the estate of W. Scott Thomas, deceased, against Frank Ittenbach and another. From a judgment on a verdict for plaintiff for \$1,000, defendant appeals. *Reversed.*

Elam, Fesler & Elam, for appellants.

Kealing & Hugg and *H. N. Spaan*, for appellee.

LAIRY, C. J.—This action was brought in the Superior Court of Marion County by Abbie Thomas, as administratrix of the estate of her deceased husband, W. Scott Thomas, to recover damages occasioned by his death, which was caused by the breaking of a traveling crane upon which he was at work while in the service of appellants. The negligence charged is that appellants did not exercise reasonable care to provide decedent with a safe place in which to work.

The first paragraph of complaint, omitting the formal parts, is as follows: That at, and for a long time prior to, the times hereinafter stated defendants were engaged in the business of cutting and dressing stone to be used for build-

ing purposes, and, as such, owned and operated a yard and mill in the city of Indianapolis, Marion county, Indiana, where they cut and dressed stone, and they also owned and operated, in connection with the cutting and dressing of stone, a traveling crane, used to hoist stone to and from cars, planers and saws in defendants' said yard; that said crane was operated along and upon a tramway of two tracks of rails laid and fastened upon timbers, which timbers were laid and fastened to and upon wooden trestles, which rested upon the ground, and upon which said rails the traveler of said crane moved back and forth; that said rails were about forty-five feet apart and about twenty-five feet higher than the ground upon which said trestles rested; that said tramway was about one hundred and thirty-five feet in length; that said traveler consisted of timbers fastened together, along and on top of which were laid and fastened two steel or iron rails about five feet apart, running the full length of said traveler, which extended from rail to rail of said tramway, and at the end of said traveler there were four wheels resting upon the rails of said tramway, two on each rail, and underneath the rails and timbers of said traveler, and connected therewith and supporting it, were four hog chains, which, when they were properly and safely arranged, were so adjusted that each should bear its proportionate share of the weight, strain and load which said crane might carry, hoist or move in and about defendants' said yard and mill while being operated; that said timbers of said traveler were bolted and fastened together at the ends and in the center; that upon said rails of the traveler there was a cab set upon trucks at each end thereof, and in connection with these trucks were wheels, two of which were on each side of said cab, and these wheels moved on and along the rails of said traveler; that from said cab, and between the timbers, rails and hog chains of said traveler, there was suspended a block and tackle connected with the machinery in said cab, and to which block and tackle there was attached a hook, which

was fastened to the stone or other object to be moved by said crane; that by means of said traveler, defendants moved large blocks of stone in and about their said yard and mill, in the course of their business as such contractors, and in cutting and dressing stone to be used for building purposes; that in said cab were located an engine, boiler and the machinery necessary for moving said traveler, and for moving said cab along the rails of said traveler, and for hoisting or moving said stone in and about defendants' said yard by means of said block and tackle as aforesaid; that said traveler moved along said tramway by means of the wheels at the end of said traveler, which rested upon the rails of said tramway; that said truss-rods supported the timbers, machinery, rails and cab of said traveler, and it was upon these hog chains that the load moved by said crane was carried; that said tramway ran east and west, and said crane was so constructed that said traveler could be moved east and west on and along the rails of said tramway, and said house or cab upon said traveler could be moved north and south between said tramway; that said traveler had been so constructed that it could hoist and move in safety, and had hoisted and moved in safety, prior to February 6, 1907, large blocks of stone, weighing twenty-two and twenty-three tons, and when in good repair should hoist in safety stones and other large bodies weighing twenty tons.

That W. Scott Thomas, plaintiff's decedent, was in the employ of defendants on February 6, 1907, and had been in their employ for a long time prior thereto, in the capacity of engineer of said traveling crane; that as such it was his duty to perform his work in said cab upon said traveler, and to run and operate said engine, boiler and machinery connected therewith, and, at the order and direction of defendants, their agents and employes, to move, by means of said crane, blocks of stone, and in order to do so, it was necessary for him to move and operate said cab north and south along the rails of said traveler, and move and operate

said traveler upon and along the rails of said tramway east and west, thereby moving and placing said stones at such places in and about said yard and mill as defendants, their agents and employes might desire; that defendants had used said traveling crane for a long time prior to said date, and the happening of the injuries hereinafter complained of; that defendants carelessly, wrongfully and negligently suffered and permitted the timbers, upon which the rails and the cab rested, to become old, rotten, weak and worn out, and carelessly, wrongfully and negligently suffered and permitted the hog chains supporting said timbers, rails and cab, by reason of the use to which they had been put, to become weakened, and the iron or steel to become crystallized, and rendered wholly insufficient in strength to support, carry and hoist the loads which defendants required plaintiff's decedent to lift, hoist and move with said crane, and rendered said traveler wholly insufficient for the purpose for which it was to be used, and rendered it dangerous and defective; that it was not the duty of decedent to inspect and repair said crane, or any of its several parts.

That on February 6, 1907, while decedent was engaged in the discharge of his duties, as such employe of the defendant, and while engaged in operating said crane, and while in the place where his said duties required him to be, to wit, in said cab, and while engaged in lifting a stone weighing only fourteen tons, under the order and direction of defendants, their agents and employes, in the line of their duty as such agents and employes, one of the hog chains and timbers of said traveler, supporting said cab, by reason of its weakened, defective, rotten and crystallized condition, broke, causing said cab to turn over and fall to the ground, fracturing decedent's skull and right leg, and otherwise wounding, crushing and mangling him, by reason of which he then and there died; that defendants, at and before the breaking of said timbers and of said hog chain, had knowledge that said timbers in said traveler were old, weakened, rotten, worn

cut, and defective and dangerous as aforesaid, that said hog chain was weakened, and that the iron or steel in said chain had become crystallized, and that said chain was insufficient to support, carry and hoist the loads that defendants were hoisting, moving and placing with said traveler, as aforesaid, and which they required decedent to hoist and move with said crane; that said chain was wholly insufficient for the purposes for which it was used, and was defective and dangerous as aforesaid, and defendants had knowledge of said defective condition long enough prior to said injuries to repair said chain and put it in good condition, by the exercise of reasonable care; that decedent did not know that said timbers in said traveler were old, weakened, rotten, worn out and out of repair, and defective and dangerous as aforesaid, and did not know that said hog chain was weakened, or that the iron or steel in it was crystallized, and insufficient to support, carry and hoist the load which defendants required, ordered and directed him to hoist, move and place with said crane, or that said hog chain was wholly insufficient for the purposes for which it was used, or was defective and dangerous as aforesaid.

That said decedent at the time of his death was fifty-five years old, and his expectancy at said time was seventeen and fifty-eight one-hundredths years; that on August 31, 1907, plaintiff was appointed administratrix of the estate of said W. Scott Thomas, deceased, by the clerk of the Marion Circuit Court, who was and is *ex officio* the clerk of the Probate Court of Marion County, Indiana, and that she duly qualified and assumed the duties as such administratrix, and is now acting as such; that said W. Scott Thomas died, leaving surviving him as his sole heir at law, his widow, the plaintiff; that at the time of his death, decedent was earning \$18 a week, and was in good health; that said injuries and consequent death of plaintiff's decedent were caused solely by the negligent, careless and wrongful acts of defendants as aforesaid, and that said negligent acts and conduct were the

sole and proximate cause of the injuries to, and the consequent death of, plaintiff's decedent, to plaintiff's damage in the sum of \$10,000. The second paragraph was substantially like the first, except that the negligence charged in the first as to the rotten lumber was omitted from the second.

The third paragraph was like the first, except that the only negligence charged was the failure of appellants properly to adjust the hog chains so that each would bear its proportionate share of the weight, and that by reason of such faulty adjustment the weight of everything lifted by the crane rested largely upon one of the hog chains, when a proper adjustment would have distributed the weight to four.

The fourth paragraph was substantially like the third, except that the negligence charged against appellants was their failure properly to inspect the traveling crane, and their consequent failure to discover that the hog chains were improperly adjusted.

Appellants filed an answer in general denial to each paragraph of the complaint, and the issues thus formed were submitted to a jury for trial. The jury returned a general verdict in favor of appellee, and also returned with the general verdict answers to 102 interrogatories submitted by the court. Appellants moved for judgment in their favor on the answers to the interrogatories notwithstanding the general verdict, which motion was overruled and exception reserved, and this action of the court is assigned as error and relied on for reversal.

In passing on the question here presented, this court must look solely to the general verdict, the interrogatories and the answers thereto, and the issues as made by the plead-

1. ings. The general verdict, when considered separately for the purpose of this motion, is presumed to
2. find every material fact within the issues in favor of the prevailing party. The general verdict, however, is not the entire verdict of the jury. The interrogatories

and the answers thereto constitute a part of the verdict, and must be considered in connection therewith. So far as the answers to the interrogatories are in irreconcilable

3. conflict with the general verdict, such answers control, and override the general verdict. If the facts found by way of answers to interrogatories cover every issue made by the pleadings, and if they are so clearly in conflict with the general verdict as to make it impossible to reconcile the two under any evidence admissible within the issues, then the general verdict must yield as an entirety. If the answers to the interrogatories are in irreconcilable conflict with the general verdict upon certain issues formed by the pleadings, this has the effect to narrow the ap-

4. plication of the general verdict to the other issues within the pleadings, upon which there is no such irreconcilable conflict between the general verdict and the answers to the interrogatories, and the general verdict must stand, if it stands at all, upon these issues. If the answers to the interrogatories are not in irreconcilable conflict with the general verdict, as applied to one or more of the issues, such general verdict will stand upon those issues, notwithstanding the irreconcilable conflict between such answers and the general verdict as to other issues; and, in the further consideration of the case, the general verdict will be treated as resting solely upon those issues to which it is so limited by the answers to the interrogatories.

We shall now consider the issues in reference to defendants' negligence as presented by the first paragraph of complaint in connection with the general verdict and

5. the answers to the interrogatories bearing upon such issues. The negligence charged against defendants is that they negligently suffered and permitted the lumber upon which the rails and cab rested to become old, rotten, weak and worn out, and carelessly suffered and permitted the hog chains supporting said lumber, rails and cab, by reason of the use to which they had been put, to become

weakened, and the iron or steel in said chains to become crystallized, and rendered wholly insufficient in strength to support, carry and hoist the loads that were required to be lifted, hoisted and moved by said crane, and rendered said crane wholly insufficient for the purposes for which it was used, as well as dangerous and defective.

The interrogatories and the answers thereto, bearing directly upon the facts material to this issue, are as follows:

“Q. Was said traveler so constructed that it was supported by four hog chains? A. Yes. Q. Did each of these hog

chains consist of three iron rods? A. Yes. Q. Were such

iron rods coupled together by links, so that three of them made a continuous chain extending from one end of the bridge of the traveler to the other end thereof? A. Yes.

Q. Was each of these hog chains made of wrought iron? A. Yes. Q. Were the threads cut on each end of each chain

by which their diameter was reduced where such threads were cut to about one and five-eighths inches? A. Yes.

Q. Was the estimated tensile breaking strength of each of said rods at least 60,000 pounds? A. Yes. Q. If of rea-

sonably good iron, should these four rods have carried at least 240,000 pounds? A. Yes. Q. Did one of these rods

break, and allow the engine upon the traveler to fall, with the decedent upon it, to a stone pile below the traveler, and so cause the death of decedent? A. Yes. Q. Was there any

other cause for the falling of the engine and the death of the decedent, except the breaking of one of the hog chains? A.

No. * * * Q. Was the rod that broke crystallized at the point of fracture at the time it broke? A. Yes. Q. Did

such crystallization to some extent weaken it at that point? A. Yes. Q. What portion of its original strength, if any,

was taken away by such crystallization? A. No evidence. Q. Could this crystallization be discovered in any way be-

fore the rod broke? A. No. Q. If it could be discovered, by what examination or inspection could it have been done

before it broke? A. No evidence. Q. What was there that

could be seen on the outside of the rod before it broke, to show any crystallization? A. Nothing. Q. Is there any test or inspection of any kind that will determine that a rod is crystallized before it is broken, and the inside revealed by the fracture? A. No. Q. Was the breaking of the hog chain the sole cause of the engine's toppling over, and killing decedent? A. Yes."

It is true that ordinary care on the part of the master requires that he shall take notice of the tendency of parts

of machinery to decay from age, or wear out by use,

6. and the law requires him to make reasonable inspection of the various parts of machinery from time to time for the purpose of discovering any defective parts, to the end that such parts may be replaced or repaired, and his failure to make proper inspection or to repair or replace defective parts which are discovered or which might have been discovered by such inspection, is negligence; but the master is not liable for an injury to his servant caused by a hidden defect in the machinery or appliances furnished to the servant, when such defect was unknown to the master and of such a character that it could not be discovered by reasonable care and skill in inspection. *Chestnut v. Southern Ind. R. Co.* (1901), 157 Ind. 509; *Louisville, etc., R. Co. v. Bates* (1897), 146 Ind. 564; *Baxley v. Satilla Mfg. Co.* (1902), 114 Ga. 720, 40 S. E. 730; *Sack v. Ralston* (1908), 220 Pa. St. 216, 69 Atl. 671, 17 L. R. A. (N. S.) 104.

The answers to interrogatories explicitly show that the breaking of the hog chain was the sole cause of the injury,

and that the defective condition of said chain, as

5. charged in the complaint, was not known to appellants, and could not have been discovered by any test or inspection possible. It is therefore apparent that the answers to the interrogatories before quoted are in direct conflict with the general verdict when such general verdict is considered in connection with the issues formed under the first paragraph of the complaint. As the charge of negli-

gence contained in the second paragraph of complaint is practically the same as that contained in the first, what has been said applies with equal force to the second paragraph. The effect of the answers to interrogatories quoted is to limit the application of the general verdict to the issues formed under the third and fourth paragraphs of the complaint.

We shall now consider the answers to interrogatories and the general verdict in connection with the issues formed under the third and fourth paragraphs of complaint.

7. The gravamen of the charge of negligence in the third paragraph is that the traveler was supported by four hog chains, two on each side; that these chains should have been so adjusted as to bear the weight equally, but that they were negligently and carelessly adjusted by defendants, by the tightening of one of them more than the others, that one was required to sustain a weight greatly in excess of its proportion, and more than its strength would stand, and that it broke by reason of this improper and negligent adjustment. The fourth paragraph of complaint charges the same defective adjustment of hog chains as the third, and charges that appellants were negligent in failing, by proper inspection, to discover the defect. The third paragraph alleges that the defective adjustment of the hog chains was known to appellants, and the fourth charges that it could have been known to them had they made proper and reasonable inspection. Both of these paragraphs allege that the defective adjustment of the hog chains was not known to decedent. The effect of the general verdict is to find that the hog chains were defectively adjusted, as alleged, and that one of them broke by reason of such defective adjustment, and caused the death of decedent; that appellants knew of such defective adjustment, or that they might have known of it by making a reasonable inspection, and that the defective adjustment was not known by decedent.

The answers to interrogatories, so far as they relate to

the negligence charged in the third and fourth paragraphs of complaint are as follows: “(23) Q. Was the traveler in question built with the design that it would carry safely loads weighing twenty tons? A. Yes. (24) Q. Had it been used a number of years in defendant’s stone yard to carry loads, most of which weighed fifteen tons or more? A. Yes. * * * (26) Q. Was there at any time before the accident in which decedent was killed any indication that the traveler was not strong enough to carry the loads that were put upon it? A. No. (27) Q. Was there at any time anything in the appearance or movement of the traveler that indicated that it would not carry loads of fifteen tons or more? A. No. * * * (34) Q. Did defendants believe, and have good reason to believe, that the hog chain that broke was sufficient to carry the loads to which it was subjected in their business, without danger, up to the time decedent was killed? A. Yes. * * * (59) Q. When the traveler lifted the stone in question, and while it was carrying it to the place where it was about to be deposited, what, if anything, was there to indicate that the rod that broke was not strong enough to carry the stone? A. Nothing. (60) Q. Did said rod, together with the other rods under the traveler that did not break, carry said stone safely until decedent begun to lower it? A. Yes. (61) Q. Until the rod broke, what, if anything, was there to indicate that any part of the traveler was not sufficiently strong to carry the stone that decedent was starting to lower when his engine and cab fell? A. Nothing. * * * (64) Q. As operator of the engine, was the engineer in better position than any one else to determine when any particular hog chain should be slackened or tightened? A. Yes. * * * (66) Q. Had the one that broke been adjusted according to his direction on the same day or a few days before he was killed? A. No. * * * (68) Q. Was it so adjusted by shortening it? A. Yes. (69) Q. Was such adjustment one of the causes of the chain’s breaking at the time it did?

A. Yes. (70) Q. Would it have broken as it did if it had not been so adjusted? A. No. (71) Q. Did the adjustment of the hog chains and the distribution of the strain upon them have anything to do with the breaking of the one that parted. A. Yes. (72) Q. If so, was it because the one that broke was drawn up tighter and made shorter than it should have been? A. Yes."

Appellants contend that the answers to interrogatories clearly show that they did not know that the hog chains were defectively adjusted, and that they could not have known this fact by reasonable inspection.

The first interrogatory relied on is the twenty-sixth, in which the jury find that there was never any indication at any time, before the accident in which decedent lost his life, that the traveler was not strong enough to carry the loads placed upon it. It is claimed by appellants that this amounts to a finding that the defective adjustment could not have been discovered by inspection, the argument being that an inspection could only disclose defects of which there was some outward indication, and if there was nothing to indicate the weakness of the machine, that an inspection could not have disclosed it. This interrogatory, when considered in connection with the ones directly preceding it, which relate to the length of time the machine had been used, and weights that had been lifted by it, must be construed to mean that nothing had developed in the use of the machine in the past that would indicate that it was not strong enough to carry the loads that were put upon it. It may be true that the machine may have been used for years in lifting weights similar to the one under which it broke, and that nothing occurred or developed in such use that would indicate a weakness or defect, and still a defect might exist that could readily be discovered by a careful inspection of its various parts.

The general verdict finds that the defective adjustment could have been discovered by reasonable inspection and the

interrogatory under consideration does not expressly and directly find that it could not. No interrogatory was propounded to the jury which required an answer as to whether the defective adjustment could have been discovered by an inspection. No inferences will be indulged in favor of an interrogatory as against the general verdict; all presumptions are to the contrary.

What has been said in reference to interrogatory twenty-six, applies with equal force to interrogatory twenty-seven. By the thirty-fourth interrogatory the jury find that appellants believed and had good reason to believe that the hog chain that broke was sufficient to carry the loads to which it was subjected in their business, without danger, up to the time plaintiff's decedent was killed. The fact that appellants believed the machine to be safe, and had good reason so to believe, would not excuse them from liability, if it was in fact defective, and if such defect could have been discovered by a reasonable inspection.

Interrogatories fifty-nine and sixty-one find that when the traveler lifted the stone under the weight of which it broke, and while it was carrying it to the place where it was about to be deposited, there was nothing to indicate that the rod that broke was not strong enough to carry the stone; and that, until the rod broke, there was nothing to indicate that any part of the traveler was not sufficiently strong to carry the stone. What we have said in discussing interrogatory twenty-six applies with equal force to these. We may also add in reference to these interrogatories, that they find only that there was nothing to indicate that the parts of the traveler were not sufficiently strong; they do not find that there was nothing to indicate that the parts were not properly adjusted.

It is also claimed by appellants that interrogatory sixty-four shows that decedent had a better opportunity to know of the danger than appellants had, and that decedent, there-

fore, assumed the risk. Interrogatory sixty-four finds that the engineer, as operator of the engine, was in a better position than any one else to determine when any particular hog chain should be slackened or tightened. This does not necessarily mean that decedent had an equal opportunity with appellants to know that the chains were not properly adjusted. One definition given by Webster for the word "position" is: "The spot where a person or thing is or is placed or takes a place; site; place; station; situation." Giving the word this meaning, the finding of the jury in answer to this interrogatory means that the position of the engineer in the cab was more favorable than that of any one else from which to determine when any particular hog chain should be tightened or slackened. It is a well settled rule

of law that an answer to an interrogatory will not

3. be held to be in conflict with the general verdict if the apparent conflict could be reconciled by any evidence admissible within the issues. Evidence was admissible within the issues to show that the hog chains had been ad-

7. justed shortly before the accident, that decedent had not been in his station in the cab after such readjustment until immediately before the accident, and that he had no opportunity to discover the defective and improper adjustment of the hog chains. This interrogatory does not, therefore, find that decedent had an equal opportunity with appellants to discover the danger to which he was exposed. The interrogatories are not in irreconcilable conflict with the general verdict, when considered in connection with the issues formed under the third and fourth paragraphs of complaint, and appellants' motion for judgment in their favor on answers to interrogatories was properly overruled.

Appellants filed a motion for a new trial, which was overruled and exceptions reserved. The causes assigned for a new trial, and relied on for reversal, are (1) the giving of instruction twenty-five; (2) the giving of instruction thirty-

one; and (3) that the verdict of the jury is not sustained by sufficient evidence.

The twenty-fifth instruction is as follows: "If you find from a fair preponderance of the evidence that defendants, shortly before the death of decedent, as alleged, had

8. repaired the bridge of defendants' traveler, upon which decedent was, at the time, employed, then it was the duty of defendants to exercise reasonable and ordinary care and diligence in making such repairs, and, in so doing, to adjust the truss-rods, or hog chains, supporting said bridge in such manner that they should be reasonably fit and safe to do the work which defendants required to be done with said traveler. And if you find from a fair preponderance of the evidence that at the time and place in question defendants employed decedent to operate said traveler, and he was, in fact, so engaged in the operation thereof, in the line of his employment and the discharge of the duties required of him in his work, and if you further find that shortly before the accident that caused the death of decedent, defendants negligently and carelessly repaired and overhauled said bridge and said truss-rods, or hog chains, and that as a result of such negligent repairs—if you find they were negligently made—said truss-rods, or hog chains, were so loosened and so adjusted that the strain of the loads attempted to be moved by said traveler was unequally distributed, and as a result thereof a greater weight and strain was put upon one or more of said truss-rods, or hog chains, than upon the others, and if you further find that because of such negligence and carelessness in the repair and adjustment of said truss-rods said traveler could not, and did not hoist and move in safety loads of less weight than had been hoisted and moved by it before the defendants repaired said rods, and if you further find that, as the direct and proximate result of such negligence of defendants, one

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of said truss-rods broke, and caused the cab on said bridge to fall and kill decedent—then I instruct you that plaintiff in this case would be entitled to recover, provided you further find that plaintiff's decedent was himself free from any negligence proximately causing or contributing to the alleged injuries resulting in his death."

In this instruction the court undertook to inform the jury what facts appellee was required to establish in order to entitle her to a verdict. Such an instruction amounts to a direction to the jury to return a verdict in favor of plaintiff, if the facts enumerated therein are established by the evidence, and that the facts so enumerated are sufficient, if established, to warrant such a verdict, unaided by any other facts. If such an instruction omits from the facts enumerated one or more facts, proof of which is essential and necessary to a recovery by plaintiff, it is erroneous. An instruction that is erroneous for this reason cannot be cured by the giving of other instructions that correctly state the law. *American, etc., Tin Plate Co. v. Bucy* (1909), 43 Ind. App. 501; *Lake Shore, etc., R. Co. v. Johnson* (1909), 172 Ind. 548; *Pennsylvania Co. v. Ebaugh* (1899), 152 Ind. 531. Before plaintiff was entitled to a verdict, it was necessary for her to prove that her decedent had no knowledge of the defective condition of the machine which caused his death, and also that he could not have known of such defects by the exercise of ordinary care. It will be observed that this instruction makes no reference to decedent's knowledge or want of knowledge of the defects mentioned in said instruction. If the jury obeyed this instruction, it could return a verdict in favor of the plaintiff, even though it failed to find from a preponderance of the evidence that decedent had no knowledge of the defects complained of, or even though it was satisfied from the evidence that he did possess such knowledge. The giving of this instruction

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was prejudicial error, which entitles appellant to a new trial.

As a new trial must be granted for the error already pointed out, it is unnecessary to prolong this opinion in the consideration of other errors assigned, as the same questions may not arise upon a second trial.

Judgment reversed, with directions to grant a new trial.

KRAUS ET AL. v. THOMAS ET AL.

[No. 7,445. Filed October 6, 1911.]

1. APPEAL.—*Briefs.—Waiver.*—Alleged errors not discussed are waived. p. 440.
2. PARTITION.—*Quieting Title.—Complaint.—Cross-Complaint.*—A suit to quiet title to alleged interests in certain lands and for partition necessarily assails defendant's claim of title to the whole thereof; and she may assert her title in a cross-complaint and have all matters of title litigated in the one suit. p. 440.
3. QUIETING TITLE.—*Mistake in Former Decree.—Cross-Complaint.*—A cross-complaint setting out that defendant's mother had obtained an order setting over to her the real estate in question as the widow of the owner, his estate being appraised at less than \$500, that the land had been erroneously described in such decree, that defendant's mother had been in possession thereof at all times and that she had conveyed it to the defendant by a correct description, and that defendant owns it, is sufficient on demurrer, the plaintiffs' complaint asserting ownership of certain interests in such land. p. 441.
4. JUDGMENT.—*Errors.—Correcting.—Evidence.*—A decree erroneously describing real estate can be corrected in a proper proceeding; and other evidence besides the decree is admissible. p. 441.
5. APPEAL.—*Right Result.*—Where the trial court reached a right result on the merits, its decision will not be disturbed. p. 441.

From Ripley Circuit Court; *Frank E. Little*, Special Judge.

Suit by Valentine Kraus and others against Dora Thomas and others. From a decree for defendants, plaintiffs appeal. *Affirmed.*

Cornet, Rebuck & Jackson, for appellants.

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Charles H. Willson, John O. Cravens, Charles R. Willson and Romncy L. Willson, for appellee Dora Thomas.

IBACH, J.—Appellants assert title to an undivided interest in certain lands in Ripley county, Indiana, and in their complaint ask that their title be quieted and that they have partition. Defendant Joseph Kraus disclaimed any interest in the land, and defendant Dora Thomas (formerly Dora Kraus) filed an answer in general denial, and also a second paragraph, which may be termed an answer in estoppel, and which contained, in substance, the following averments: That for more than twelve years she had been the owner, and in possession of the real estate described in the complaint; that she and the plaintiffs are the children and only heirs of Henry Kraus and Sophia Kraus, his wife, both deceased; that Henry Kraus died in 1895, the owner of the real estate described in the complaint, of which he had been in possession from 1845 to 1895; that his estate was worth less than \$500, and it had been set off to his widow by a decree of the court in a proceeding filed by her for that purpose; that the widow remained in possession of the land until January 12, 1906, when she conveyed it by deed to appellee Dora Thomas and she has been in possession of it ever since.

It also appears in this answer that at the time the petition was filed by the widow, and during all the time her action to have her husband's estate set over to her, was pending, all the plaintiffs were residents of Ripley county, and no objections were ever made by any of them to the entering of the decree, until after the deed was made to said appellee, when they filed their suit, asking that such deed be set aside, for the reason that said widow was of unsound mind when she executed it, that it was made without consideration, and because of undue influence. It appears from the record, however, that this complaint was abandoned, and the complaint now before us followed.

Said appellee also filed her cross-complaint, in which she

asserted title to the whole of the land in controversy, and again specially pleaded the facts upon which her claim is founded, adding the further averments, that in the petition filed by the widow, Sophia Kraus, the real estate was erroneously described; that the scrivener who prepared the petition described the entire property as it had been described in the deed to Henry Kraus in the year 1854, as

“fifteen acres off of the north end of the northeast fourth of the southwest quarter of section twenty-three, township six, range ten east; all the southwest fourth of the southeast quarter of section twenty-three, township six, range ten east; also, twenty-five acres off of the south side of said section twenty-three;”

that the only real estate belonging to Henry Kraus that was correctly described in said petition, was the fifteen acres aforesaid (to which appellants make no claim), and that the remainder of the land was intended to be described as the northwest fourth of the southeast quarter of said section twenty-three, and as twenty-five acres off the south side of the northeast fourth of the southwest quarter of section twenty-three; that the grantor of Henry Kraus placed him in possession of the land, which was intended to be so correctly described, immediately after the deed was prepared, and he remained in undisputed possession thereof until his death, and the land so occupied by him, including the fifteen acres correctly described, was the only land that he possessed in said section twenty-three; also, that the land actually occupied by said Kraus was the identical land viewed and appraised in the widow's petition, when the appraisers duly appointed made the appraisement, and reported to the court that decedent's estate was worth less than \$500, and was the same land that has been occupied by said widow since the decree of the court vesting all her husband's estate in her.

The record discloses two prayers for relief: one that the record and decree vesting the estate in the widow be corrected to contain the proper description, and the other that

appellee Dora Thomas's title be quieted against each and all of the appellants. She elected, upon motion of appellants, to stand upon that prayer which asked that her title be quieted. Appellants' demurrer to the cross-complaint was overruled, and an exception properly saved. Various other pleadings were filed, but the only points brought up for our consideration arise upon said appellee's cross-complaint. The trial resulted in a decree for said appellee, quieting her title according to her prayer.

Appellants, in asking this court to reverse the decree, have failed to present in a proper manner for our consideration the assignment of any error, except that the

1. court erred in overruling the demurrer to said appellee's cross-complaint. It has been held repeatedly by this court and the Supreme Court, that where an appellant fails in his brief to refer to an alleged error he waives it, and that specifications for a new trial are waived if not discussed. These rules are too well established to need citation of authority.

We shall consider the alleged error that is properly presented, and that is the important question in this appeal. It will be observed that the cross-complaint was not a cross-complaint to correct the record, but one in which said appellee asked that her title be quieted. This theory was relied on by said appellee as a result of appellants' motion to require her to make an election. This, appellants have evidently forgotten; as they discuss at much length the inherent power of the court to correct an error in a judgment.

By statute (§1116 Burns 1908, §1070 R. S. 1881), "an action may be brought by any person, either in or out of possession, * * * against another who claims title

2. to or interest in real property adverse to him, although defendant may not be in possession thereof, for the purpose of determining and quieting the question of title." By the filing of the complaint, said appellee's title

was assailed, and it was proper for her to assert her title in a cross-complaint, and thereby litigate and have determined all matters affecting the title to the property.

In her pleading she says that by a mere mistake the property owned by her had been erroneously described in the transfer to her immediate grantors, but that in her

3. deed it had been properly described. These, supported by the remaining averments, make her cross-complaint sufficient to withstand a demurrer for want of facts. As appellants claimed an adverse interest, the trial court had statutory authority to quiet the title. In doing this the court did not order its former decree setting aside the property to the widow to be corrected, nor was this necessary or proper in such a suit. The question of correcting this decree was not before the court after said appellee's election of prayers.

Although we are not called on to determine the question in this appeal, we may add, generally speaking, that while the merits of a decree of the lower court cannot be

4. questioned in a collateral suit, yet we are satisfied that in a proper proceeding brought for that purpose a mere clerical error can be corrected, and other evidence is admissible besides the decree itself. It would be useless to ask relief against a clerical error unless it be first shown that there is such error, and the instances are few indeed where the error appears upon the face of the record itself. *Jenkins v. Long* (1864), 23 Ind. 460.

We have examined the entire record in the case, including the errors assigned but not discussed, and we have also read

the evidence with much care, and find, not only that

5. the court was right in overruling appellants' demurrer to the cross-complaint, but that the judgment is correct on the facts averred in such cross-complaint and in the answer, all of which seem to have been fully supported by proof on the trial.

Judgment affirmed.

FURNESS v. BRUMMITT.

[No. 7,607. Filed October 10, 1911.]

1. **DRAINS.**—*Void Order Establishing.*—*Injunction.*—*Estoppel.*—*Jurisdiction.*—One who obtains a decree enjoining the construction of a drain established under an order alleged to be void for want of jurisdiction, is estopped to assert in another suit that the board had jurisdiction in making such void order and that therefore the board's jurisdiction was lost in such proceeding. p. 444.
2. **DRAINS.**—*Void Orders.*—*Jurisdiction.*—An order for the construction of a drain, made at a void special session, does not affect the board's jurisdiction to proceed with the drainage case at a later regular session. pp. 445, 446, 447.
3. **DRAINS.**—*Erroneous Judgment.*—*Remedy.*—*Appeal.*—The remedy for an erroneous order made by the board of commissioners in a drainage case is by appeal. p. 445.
4. **JUDGMENT.**—*Void.*—A void judgment is a nullity. p. 446.
5. **JUDGMENT.**—*Final.*—*Subsequent Change.*—*Boards of Commissioners.*—Boards of commissioners have no power to change final orders made in cases over which they have jurisdiction, and where such orders are made when they are in lawful session. p. 447.
6. **DRAINS.**—*Injunction.*—*Parties.*—Where a drain has been established and a commissioner appointed to construct it, a suit to restrain the construction thereof must be against such commissioner, and not against the petitioners. p. 447.

From Porter Superior Court; *Charles H. Truesdell*, Special Judge.

Suit by Albert W. Furness against William Brummitt. From a judgment for defendant, plaintiff appeals. *Affirmed.*

N. L. Agnew, for appellant.

H. H. Loring, for appellee.

FELT, P. J.—The facts pertinent to the question presented for decision by this appeal are as follows: On June 30, 1906, appellee filed in the office of the auditor of Porter county, Indiana, his petition for the drainage of certain lands belonging to himself and others, averring that the drain would not exceed two miles in length, and would not

cost to exceed \$300, which petition was by the auditor referred to the county surveyor. On July 10, 1906, the surveyor filed his report thereon, which report was on file when the board of county commissioners convened on August 6, 1906. Said board, "by agreement of the parties," set the report for hearing specially on August 11, 1906, which time was after the expiration of the August term of the commissioners' court, and in vacation. On said day "the board met as per adjournment" at their regular place of meeting, and proceeded to hear and determine all questions relating to said drainage petition, and after finding that due notice had been given, and after considering certain remonstrances—including that of appellant—by agreement of the parties the board approved said report, confirmed the assessments as modified, established the ditch, and referred it to Alfred R. Putnam, county surveyor, for construction. Appellant's land was assessed \$10, and he was present when the order of August 11, 1906, was made by the board of commissioners. Thereafter appellant appealed to the Porter Superior Court, which appeal was dismissed by the court, and thereupon appellant filed suit in said superior court against appellee and said surveyor, to enjoin the construction of said ditch, alleging that the order of the board of commissioners entered on August 11, 1906, was void, because the board had no power to adjourn from August 6 to August 11, 1906, to consider and pass upon the petition and remonstrances in said proceeding; that no notice of the convening of the special session of said board had been given, and the board was not legally in session on August 11, and the order then made was void. On June 25, 1907, that suit was tried, and the Porter Superior Court entered a decree, enjoining the construction of said ditch under the order of August 11. On July 1, 1907, appellee appeared before said board of commissioners, while in legal session, called up said proceeding, made known the action of the superior court, and thereupon said board set the hearing of the re-

port of the engineer and the remonstrances in said proceeding for the first Monday in August, 1907, and notified all parties affected thereby of the time and place of hearing. On Monday, August 5, 1907, the board took up the hearing of said report, including the remonstrance of appellant filed on July 16, 1906. Appellant appeared before said board, and filed a motion praying for a dismissal of appellee's petition and the report thereon, on the ground that the commissioners then had no jurisdiction over said petition and report, and no authority to hear and determine them, which motion was overruled by the board. Thereupon the board proceeded to hear the evidence on said report and remonstrance, in the presence of appellant, and after hearing it, made an order confirming the assessments shown in the report establishing the ditch and appointing as construction commissioner Guy F. Stinchfield, county surveyor.

No appeal was taken from this order, but on September 9, 1907, appellant filed suit in the Porter Superior Court against appellee and Guy F. Stinchfield, to enjoin them from constructing said ditch as ordered by the board on August 5, 1907. The complaint was dismissed as to Stinchfield. Appellee Brummitt thereupon filed an answer in two paragraphs, the first of which was a general denial, and the second set up in detail the facts of all the proceedings in both courts. A demurrer for want of facts was filed to the second paragraph of the answer, and was overruled. The court found for appellee, and that appellant should take nothing by his complaint. Judgment was rendered accordingly. A motion for a new trial was filed and overruled.

The errors assigned present the question that the finding of the court is not sustained by sufficient evidence.

The gist of appellant's contention is that after the judgment of the superior court was rendered on June 25, 1907,

enjoining the construction of the ditch, there was no

1. proceeding pending before the board of commissioners; that nothing was before it upon which it could

legally act in said proceeding, and that its action in setting the case for hearing, in assuming jurisdiction, and in trying and determining the case was absolutely null and void, and that appellee should have been enjoined, as prayed. This is a suit in equity. He who seeks equity must do equity. Appellant obtained in his favor the judgment of June 25, 1907, holding the order of the commissioners, made on August 11, 1906, void, and appellee acquiesced therein, and on his application the further proceedings in the case were taken before the board of commissioners, so that for the purposes of this appeal the orders of the board of commissioners, made on August 11, 1906, must be considered as null and void. Appellant cannot now consistently contend that the order was regular and valid, and ended the jurisdiction of the board, or that it was only erroneous, after having obtained an injunction on the ground that it was absolutely void. In view of this situation, the proceeding before

2. the board of county commissioners was not changed by the action of the members of the board on August 11, but remained the same as if no such action or attempted action had been taken.

Had the board been legally in session, a question we need not and do not determine (*Kraus v. Lehman* [1898], 170 Ind. 408), and made such order, even though er-

3. roneous, the remedy would have been by appeal and not by suit to enjoin. *Gavin v. Board, etc.* (1885), 104 Ind. 201, 206; *Badger v. Merry* (1894), 139 Ind. 631, 634. What the superior court did was to enjoin the carrying out of an order that was alleged to be void, because it was made when the board was not legally in session.

The writing appearing on the records, though placed there in pursuance of the direction of members of the board, when not legally in session as such board of commissioners,

2. did not change the status of the case; the delay in taking further action did not destroy the jurisdiction of the board, which had already attached, nor did the judg-

ment of the superior court go further than to enjoin the execution of the void order. *Hobbs v. Board, etc.* (1885), 103 Ind. 575, 580; *Anderson v. Weber* (1907), 39 Ind. App. 443.

In the case of *Tolin v. Jones* (1904), 33 Ind. App. 423, 431, this court, in speaking of an order made by a board of commissioners, said: "As this additional order was
4. absolutely void because of want of jurisdiction of the subject-matter concerning which it was made, it was immaterial whether it stood as such, or should afterwards be stricken out. It could be binding upon no one for any purpose, and was from the beginning as if never made. * * * Nor can it be said that this void provision made void the final order approving the report of the viewers. The order approving the report was complete in itself." The principle involved here is the same as that in the case from which we have quoted. In 1 Freeman, Judgments (4th ed.) §117, it is stated: "A void judgment is, in legal effect, no judgment. By it no rights are divested. From it no rights can be obtained. Being worthless in itself, all proceedings founded upon it are equally worthless. It neither binds nor bars any one." See, also, *Thompson v. McCorkle* (1894), 136 Ind. 484, 493, 43 Am. St. 334.

The question we are called on to decide is not at all similar to the question presented where an appeal is taken from an order of the board of commissioners made when legally in session in a proceeding where the board has jurisdiction. Here, the judgment of the superior court enjoining the construction of the ditch, because of the want of power to act when the board ordered its construction, did not change the status of the proceeding before the board, but left it pending the same as if no steps had been taken after August 5, 1907.

In reaching this conclusion, we are not unmindful of the holdings of our Supreme Court, to the effect that when a

board of county commissioners, acting in a case where

5. it has jurisdiction of the person and of the subject-matter, and when in lawful session, makes a final order, it cannot subsequently change or annul such order. *Town of Hardinsburg v. Cravens* (1897), 148 Ind. 1; *Gavin v. Board, etc., supra*; *Badger v. Merry, supra*. Our conclusion is consistent with those decisions, the distinction being that in this case we are dealing with an order absolutely void, for the purposes of the case at least, because made when the board was not legally in session.

The board did not lose jurisdiction because the members thereof assumed to act when not in session, for it might lawfully begin over at the point where the proceedings

2. ceased to be legal. From this it follows that after the board, on August 5, 1907, made the second order establishing the ditch, appellant's remedy for relief from such order, if irregular or erroneous, was by appeal, and not by an independent suit to enjoin.

Furthermore, the ditch having been established, and the commissioner appointed to construct it, if any independent suit could thereafter be maintained to enjoin its construction,

6. the commissioner was the one to be enjoined, for the case had, by such orders, passed beyond the control of the petitioners or other parties to the proceeding. *Crume v. Wilson* (1886), 104 Ind. 583; *Board, etc., v. Jarneck* (1905), 164 Ind. 658.

No available error is shown by the record and the judgment is affirmed.

STRAUS ET AL. v. YEAGER.

[No. 7,144. Filed February 2, 1911. Rehearing denied June 1, 1911.
Transfer denied October 11, 1911.]

1. COURTS.—*Jurisdiction.—Contracts.—Sales.*—The circuit court of the county in which defendant lives has jurisdiction of an action to recover damages for an alleged breach of an executory contract for the sale of lands situate in Illinois. p. 453.
2. VENDOR AND PURCHASER.—*Contracts of Sale.—Tender.—Purchase Money.*—Where a contract for the sale of real estate is entire and its provisions are concurrent and dependent, an action for purchase money cannot be maintained until the vendor has tendered a deed conveying a merchantable title to the real estate. p. 453.
3. VENDOR AND PURCHASER.—*Contracts of Sale.—Divisible.—Tender.*—An action for damages lies for the breach of a provision in an executory contract for the sale of real estate without the tender of a deed, where the contract is divisible and the obligations are independent. p. 454.
4. CONTRACTS.—*Entire.—Divisible.*—A contract is not necessarily indivisible because it is contained in one instrument and signed by the same parties. p. 454.
5. VENDOR AND PURCHASER.—*Covenant to Convey.—Consideration.*—Where the covenant to convey is the consideration for the obligation to pay, a tender of the deed of conveyance is not an essential prerequisite to the collection of the debt. p. 454.
6. VENDOR AND PURCHASER.—*Contracts of Sale.—Divisibility.*—Where vendors contracted, in consideration of \$50 cash, "\$9,000 to be paid in cash * * * on November 13," and \$1,000 to be paid on the following March 1, the balance to be secured by mortgage, to convey certain lands not later than March 1, such vendors may maintain an action for such payments as they become due, although they have not tendered a deed for such land, the contract being divisible. p. 454.
7. VENDOR AND PURCHASER.—*Contract to Accept Defective Title.*—One may contract to accept a defective title, or to make payments before obtaining title, but he cannot afterwards be heard to say that another rule would have been applicable in the absence of such agreement. p. 457.
8. PLEADING.—*Complaint.—Sufficiency for Some Relief.*—A complaint sufficient to entitle the plaintiff to some relief is good as against a demurrer. p. 457.
9. VENDOR AND PURCHASER.—*Sales.—Payments.—Deeds.—Tender.—Amended Complaint.*—Where a vendee agreed to make a pay-

ment on a purchased farm on November 13, the deed to be executed not later than the following March 1, and a complaint for the collection of such payment was filed November 14, an amended complaint filed after March 1 need not show a tender of a deed, since an amended complaint relates back to the time of the filing of the original complaint. p. 457.

10. **VENDOR AND PURCHASER.—Contracts of Sale.—Remedies for Breach.—Express Mention of.—Effect.**—Where a contract for the sale of real estate provides, among other things, that “if either of the parties shall fail or refuse to perform the stipulations hereof * * * the other parties may, by suit, enforce the specific performance * * * of this contract, * * * or may at their option recover from such defaulting party * * * whatever damages they may have suffered,” the parties are not restricted to the remedies expressed, but may resort to any other legal remedies for redress. pp. 458, 460, 461.
11. **SPECIFIC PERFORMANCE.—Contracts.**—A suit for the specific performance of a contract is an equitable proceeding, and imports that the contract will be ordered performed, if at all, substantially as agreed upon. p. 460.
12. **CONTRACTS.—Exclusion of Legal Remedy.**—A contract that excludes a legal remedy for the breach thereof must be definite and positive in that regard. p. 461.
13. **CONTRACTS.—Construction.—Words.**—Contracts will be construed so as to give effect to the intention of the parties; and the words used will be given their ordinary meaning unless a different meaning is indicated. p. 461.
14. **CONTRACTS.—Construction.—Consistency.—Application of Law thereto.**—In construing a contract, the instrument should be made consistent; and the law applicable thereto should be considered in making such construction. p. 461.

From Benton Circuit Court; *J. T. Saunderson*, Judge.

Suit by Simon J. Straus and others against Edwin S. Yeager. From a judgment for defendant, plaintiffs appeal. *Reversed.*

Charles M. Snyder and *Odell Oldfather*, for appellants.
Frazer & Isham, for appellee.

FELT, J.—This is an appeal from a judgment of the Benton Circuit Court, sustaining a demurrer to a complaint in three paragraphs.

The errors assigned and argued by counsel for appellants

are the sustaining of appellee's demurrer to appellants' amended first and "third and further" paragraphs of complaint.

In the amended first paragraph of complaint it is alleged, in substance, that plaintiffs were partners doing business under the firm name and style of Straus Bros. & Co.; that on October 31, 1906, plaintiffs entered into a certain contract in writing with defendant, which contract was filed as an exhibit and made a part of the complaint; that by the terms of said contract defendant agreed to pay to plaintiffs on November 13, 1906, the sum of \$9,000, which was due and unpaid; that by the mutual mistake of the parties to said contract, and of the scrivener who wrote it, it was dated "November 31, 1906," when, in truth and in fact, it was executed on October 31, 1906; that on November 13, 1906, and thereafter, plaintiffs were ready and willing to perform all the conditions of said contract to be by them performed, and offered to perform all the conditions that had accrued up to that date, and on that date demanded of appellee the performance of each of the conditions on his part to be performed, that had accrued up to that date; that defendant refused to perform the conditions on his part to be performed, and prevented plaintiffs from performing the conditions to be by them performed. On this paragraph the plaintiffs pray judgment for \$10,000, and all proper relief.

Plaintiffs' "third and further paragraph of complaint" alleges the facts stated in said amended first paragraph of complaint, and, in addition thereto, states that by the terms of said contract, defendant sold and plaintiffs bought a stock of goods owned by defendant, and located at Earl Park, Indiana, which stock was to be invoiced at actual cost of the goods, except that those damaged, unsalable, or out of style, were to be taken at their actual value; that the possession of said stock was to be delivered to plaintiffs on November 13, 1906, and inventory was to be made of

the stock on that day or the day following; that, according to the intention of the parties executing said contract, the amount of the value of said stock of goods, when ascertained, was to be applied on the debt of \$9,000, to be paid by defendant to plaintiffs on November 13, 1906; that on November 13, 1906, plaintiffs demanded of defendant possession of said stock of goods at the place in Earl Park, Indiana, where the goods were situated, and then and there offered to proceed with the inventory thereof, and demanded of defendant the performance of his contract, and offered to perform all the conditions of said contract by plaintiffs to be performed, which had accrued to that date; that defendant refused to perform any of the conditions of said contract on his part to be performed, and then and there repudiated said contract, denied the execution thereof, refused to deliver the stock of goods to plaintiffs, or to proceed with the inventory, or to permit plaintiffs so to do, and also refused to pay said sum of \$9,000, or any part thereof, and ordered plaintiffs from the premises; that plaintiffs were ready, willing and able to do and perform all the conditions of said contract that had accrued to the date of the commencement of this suit, which they were to perform, and have actually performed all such conditions, except those that defendant prevented them from performing, and stand ready to do and perform each condition of the contract on their part thereafter to be performed, in accordance with the provision thereof. This paragraph of complaint also avers the mutual mistake as to the date of the contract, and prays that it be reformed and made to bear the date of October 31, 1906, and demands judgment in the sum of \$10,000. The original suit was filed on November 14, 1906, and the paragraphs of complaint now under consideration were filed on October 1, 1907. The demurrer challenges the sufficiency of the facts alleged, and also the jurisdiction of the court.

The contract, filed as exhibit A, shows, in substance, that

he second party, ap-
 real estate in Iroquois
 first parties agreed to
 second party by deed
 encumbrances, except
 it. The first parties
 a merchantable title
 or the examination of
 be paid as follows:
 sh to first parties on
 id in cash on March
 by mortgage on the
 aring date of March
 owing:

nents, notes, mort-
 delivered, and this
 March 1, 1907, at
 Ligonier, Indiana."

not merchantable at
 sufficient time there-
 by suit to quiet title,
 xing the deal should
 on account of defects
 defects were found,
 ify the second party
 it thereof. The con-
 :

• refuse to perform
 rt, then the other
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 defaulting parties,
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 fees, without relief
 sement laws, what-
 l by reason of such

Following this portion of the contract, we find a provision stating that

“it is further agreed that, in consideration of the foregoing, the second party hereby sells and the first party hereby buys the stock of goods now owned by the second party, which is located at Earl Park, Indiana, which stock is to be invoiced at actual cost (no charge for freight or cartage), except such goods as are damaged, or unsalable on account of style, which shall be taken at value.”

The contract further provides:

“Said stock to be turned over to Straus Bros. & Co. on November 13, 1906, and inventory to be made, starting on the 13th of November, or the 14th.”

And it also states that each party shall select an appraiser.

The contention of appellee, that the court did not have jurisdiction, cannot be approved. This may have been a sound argument as applied to the amended second 1. paragraph of complaint, which was for specific performance of the contract, and showed the purchase of real estate in Illinois, but this paragraph has been abandoned by appellants, and we have to consider only the amended first and “the third and further” paragraphs. These paragraphs seek a recovery of a part of the purchase money of the Illinois real estate upon the executory contract. Neither paragraph shows that appellants have title, nor that they have tendered title.

Appellee contends that a tender of a merchantable title is a condition precedent to the enforcement of the demand for payment of any part of the purchase money. If

2. the contract is one that must be dealt with as an entirety, and its provisions are concurrent and dependent, then the weight of authority in this State supports such contention. *Irwin v. Lee* (1870), 34 Ind. 319; *Goodwine v. Morey* (1887), 111 Ind. 68; *Melton v. Coffelt* (1877), 59 Ind. 310; *Migatz v. Stieglitz* (1906), 166 Ind. 361; *McCleary v. Chipman* (1904), 32 Ind. App. 489.

Where the contract is divisible, and the obligations are independent, if the parties to the agreement have provided that an instalment of the purchase money shall be

3. due before the time arrives for executing the deed, then suit may be maintained for the instalment due, without tendering a deed or showing title. *Wile v. Rochester Improvement Co.* (1900), 24 Ind. App. 422; *Claypool v. German Fire Ins. Co.* (1904), 32 Ind. App. 540; *Keller v. Reynolds* (1895), 12 Ind. App. 383, 387; *Loud v. Pomona Land, etc., Co.* (1894), 153 U. S. 564, 14 Sup. Ct. 928, 38 L. Ed. 822; *Wooten v. Walters* (1892), 110 N. C. 251, 14 S. E. 734; *Leonard v. Bates* (1822), 1 Blackf. *171, *173; *Cunningham v. Guinn* (1837), 4 Blackf. 341, 1 Beach, Contracts §731; 7 Am. and Eng. Ency. Law (2d ed.) 95; *Irwin v. Lee, supra*; *Carver v. Fennimore* (1856), 8 Ind. 135; *Basler v. Nichols* (1856), 8 Ind. 260; *Harshman v. Paxson* (1861), 16 Ind. 512; *Keeler v. Clifford* (1897), 165 Ill. 544, 46 N. E. 248.

A contract is not entire and indivisible because em-

4. braced in one instrument and signed by the same parties. *Pierson v. Crooks* (1889), 115 N. Y. 539, 22 N. E. 349, 12 Am. St. 831.

Where the covenant to convey is the consideration

5. for the obligation to pay, a tender of conveyance is not essential to the collection of the debt. *Trimble v. Green* (1835), 33 Ky. *353.

We are called on to determine whether the covenants in the contract executed by appellants and appellee are

6. dependent or independent. That is, on November 14, 1906, when this suit was filed, did the right of appellants to maintain this suit depend upon their execution of the covenant to convey, or upon a tender of a deed for the land? Did appellants have the right to divide the contract, and sue for the \$9,000, which, by the terms thereof, became due on November 13, 1906? We have purposely

set out all the material provisions of the contract to enable us properly to determine this question.

In the case of *Loud v. Pomona Land, etc., Co., supra*, on page 576, the court, by Jackson, J., said: "The question whether covenants are dependent or independent must be determined in each case upon the proper construction to be placed on the language employed by the parties to express their agreement. If the language is clear and unambiguous it must be taken according to its plain meaning as expressive of the intention of the parties, and under settled principles of judicial decision should not be controlled by the supposed inconvenience or hardship that may follow such construction. If parties think proper, they may agree that the right of one to maintain an action against another shall be conditional or dependent upon the plaintiff's performance of covenants entered into on his part. On the other hand, they may agree that the performance by one shall be a condition precedent to the performance by the other. The question in each case is, which intent is disclosed by the language employed in the contract? * * * In the learned note of Serjeant Williams to the early case of *Pordage v. Cole* [1607], 1 Saund. 319i, 320a, it is said that 'if a day be appointed for payment of money, or part of it, or for doing any other act, and the day is to happen, or may happen, before the thing which is the consideration of the money, or other act, is to be performed, an action may be brought for the money or for not doing such other act before performance; for it appears that the party relied upon his remedy, and did not intend to make performance a condition precedent; and so it is where no time is fixed for performance of that which is the consideration of the money or other act.' "

In the syllabus to the case of *Goldsborough v. Orr* (1823), 8 Wheat. *217, 5 L. Ed. 600, it is said that "where the acts stipulated to be done, are to be done at different times, the covenants are to be construed as independent of each other."

In the case of *Goodwin v. Lynn* (1827), 4 Wash. C. C. 714, Fed. Cas. No. 5,553, the rule is laid down that to ascertain "whether covenants are dependent or not, the intention of the parties is to be discovered, rather from the order of time in which the acts are to be done, than from the structure of the instrument."

In 7 Am. and Eng. Ency. Law (2d ed.) 95, the two classes of contracts are defined as follows: "A contract is entire when by its terms, nature, and purposes it contemplates and intends that each and all of its parts, material provisions and the consideration, are common each to the other and interdependent. A divisible contract is one in its nature and purposes, susceptible of division and apportionment, having two or more parts in respect to matters and things contemplated and embraced by it, not necessarily dependent upon each other, nor is it intended by the parties that they shall be."

In the case of *Wile v. Rochester Improvement Co.*, *supra*, this court uses the following language applicable to this case: "It is an action to recover instalments of purchase money due; the time for payment of the last instalment and for the execution of the conveyance by the plaintiff not having arrived at the commencement of the action. The promise to pay the instalments, to recover the amount of which the action is brought, was not to be performed concurrently with the execution of a conveyance, but was an independent promise. Therefore, it was not needed in the complaint to show performance, or tender of performance, or readiness and ability to perform on the part of the plaintiff." To the same effect is the case of *Walker v. Stimmel* (1906), 15 N. Dak. 484, 107 N. W. 1081. It is our conclusion that this contract meets every requirement of a divisible contract, and that the obligation to pay the \$9,000 was an independent covenant, not depending upon a tender of title.

- A party may contract to accept a defective title, or to make payments before obtaining title, but if he does so he cannot

be heard to complain that another rule would have
7. been applicable in the absence of such agreement.

Ditchey v. Lee (1906), 167 Ind. 267; *McCleary v. Chipman* (1904), 32 Ind. App. 489; *Pitman v. Conner* (1866), 27 Ind. 337.

Our code (§376 Burns 1908, §370 R. S. 1881) provides that "in pleading the performance of a condition precedent in a contract, it shall be sufficient to allege, generally, that the party performed all the conditions on his part. If the allegations be denied, the facts showing a performance must be proved on the trial." *Collins v. Amiss* (1903), 159 Ind.

593; *Watson v. Deeds* (1891), 3 Ind. App. 75, 77.

8. If a complaint is good in part, and entitles the complainant to any relief, it will withstand a demurrer. *Migatz v. Stieglitz, supra*; *Bloomfield R. Co. v. Van Slike* (1886), 107 Ind. 480; *Keller v. Reynolds, supra*.

Appellee contends that even if tender of a deed was unnecessary when the suit was filed on November 14, 1906, it

was necessary when the paragraphs of complaint,

9. now in question, were filed on October 1, 1907, because the deed was due on March 1, 1907. *Irwin v. Lee, supra*, *Leonard v. Bates, supra*, and *Ditchey v. Lee, supra*, and some other cases, are cited in support of this proposition. If no suit had been brought until after March 1, 1907, this proposition might avail appellee; but suit was begun on November 14, 1906, and the amended first and "third and further" paragraphs must be tested as of that date. The cases cited are clearly distinguishable from cases like the one at bar.

An amended complaint, in the absence of some agreement or waiver, affords the relief obtainable on the facts alleged as of the date of the beginning of the suit, without reference to the date of the filing of the amended pleading. *Jordan v. Indianapolis Water Co.* (1902), 159 Ind. 337; *Pitzele v. Reuping* (1904), 32 Ind. App. 237.

We have yet to consider the effect of the portion of the

contract that we have before set out, on the subject of remedies. This is a suit upon a contract to recover 10. an instalment of the purchase money. Can it be maintained, notwithstanding the provisions of the contract relative to remedies? We might refuse to consider the effect of that provision of the contract, as it is not mentioned under points and authorities, and is only referred to by appellant in his statement of facts and in argument. However, the decision of the questions raised by the error assigned involves the construction of the contract, and we deem it best to express our views upon it, so far as involved in the ruling upon the demurrer to the complaint.

Does the maxim "*Expressio unius est exclusio alterius*" apply to the provisions of this contract relating to the remedies to be pursued in case of default by either party? In other words, Are the appellants by this provision limited to a suit for damages for the breach of the contract, or to an equitable action for the specific performance of the contract as an entirety? This maxim has been applied to the construction of written instruments, such as deeds, wills and leases; but nowhere have we found it applied to contracts on the subject of remedies. Broom's Legal Maxims (8th ed.) 650; Wharton's Legal Maxims (Am. ed.) 87; 2 Coke on Littleton p. 210. Our courts have applied this principle to the construction of statutes. *Couchman v. Prather* (1904), 162 Ind. 250; *Hart v. Smith* (1902), 159 Ind. 182, 58 L. R. A. 949, 95 Am. St. 280; *Woodford v. Hamilton* (1894), 139 Ind. 481. The reason for this rule is stated in 2 Lewis's Sutherland, Stat. Constr. (2d ed.) §491 thus: "*Expressio unius est exclusio alterius*. This maxim, like all rules of construction, is applicable under certain conditions to determine the intention of the lawmaker when it is not otherwise manifest. Under these conditions it leads to safe and satisfactory conclusions; but otherwise the expression of one or more things is not a negation or exclusion of other things. What is expressed is exclusive only when

it is creative, or in derogation of some existing law, or of some provisions in the particular act. The maxim is applicable to a statutory provision which grants originally a power or right."

If, in the construction of statutes, "what is expressed is exclusive only when it is creative, or in derogation of some existing law, or of some provision in the particular act," or when the statute "grants originally a power or right," we may be aided by testing the provisions of the contract under investigation by applying the reasons assigned in the construction of statutes. The contract specifies the remedy of suit for damage for breach of its provisions, and also provides that "if either of the parties shall fail or refuse to perform the stipulations hereof on their part, then the other parties may by suit enforce the specific performance by the defaulting party of this contract, the execution of a deed as herein provided, and the performance of any other act hereby required of the defaulting parties." The remedies specified in the contract are available under the law, independent of the contract. No new remedy is suggested by it, and no authority has been cited showing the application of the doctrine of this maxim to contracts specifying remedies. Doubtless a contract could, by specific provisions, limit the remedies to be pursued in case of default; but that is not the question presented by the one before us. This is a question of implied exclusion.

We have sought diligently for authority upon the application of the principle that "the express mention of one person or thing is the exclusion of another," to remedies named in a contract, and have found none. The reason of the rule excluding things not mentioned fails when applied to a contract specifying remedies available under the law independent of the contract. We do not feel justified in extending the application of this maxim to a subject, to which it has not been applied, so far as we are able to ascertain, and especially so as the reason for the rule does not seem to justify

such application. This conclusion is supported by decisions of both the Supreme Court and the Appellate Court, in construing the employers' liability act of 1893. While these decisions may not be directly in point here, they do, however, clearly distinguish the sections of the act that enlarge the liability of railroads from those sections that only enact a liability already existing under the common law. In the latter case the liability given by the statute is held not to change or exclude the action given by the common law. *Thacker v. Chicago, etc., R. Co.* (1902), 159 Ind. 82, 59 L. R. A. 792; *Whitcomb v. Standard Oil Co.* (1899), 153 Ind. 513; *Corning Steel Co. v. Pohlplatz* (1902), 29 Ind. App. 250. That portion of the statute specifying a remedy where one existed under the common law before the statute was enacted, is not exclusive, for the reason that a remedy already existed, and the act, to that extent, was not creative or in derogation of existing law.

A suit for the specific performance of a contract is an equitable proceeding, and ordinarily means the performance of a contract according to the precise terms
11. agreed upon, or substantially in accordance therewith. *Rison v. Newberry* (1894), 90 Va. 513, 18 S. E. 916; *Dow v. Northern Railroad* (1886), 67 N. H. 1, 36 Atl. 510.

But the language of the contract before us goes further than the mere statement of remedies by an action for damages, or specific performance. Following the pro-
10. vision for specific performance, we find the language, "and the performance of any other act hereby required of the defaulting parties." The contract is divisible, and the obligation to pay is an independent covenant. When the time for payment arrived, and default was made, we do not feel warranted in saying that the provisions of the contract, independent of any implied exclusion, denied to appellants the remedy pursued.

A contract that excludes some remedy given by
12. law should be so definite and positive in its terms as to show the clear intention of the parties so to do.

The leading purpose in construing any contract is to ascertain the meaning and intention of the parties from the language employed. The words used are to be
13. understood in their plain, ordinary and popular sense, unless there is something in the contract to indicate a different meaning. *Beard v. Loftin* (1885), 102 Ind. 408; *Evansville, etc., R. Co. v. Meeds* (1858), 11 Ind. 273. In construing a contract, effect must be given to all its provisions and parts where possible, and no part will be rejected unless absolutely repugnant to the general intent. 1 Beach, Contracts §711; 17 Am. and Eng. Ency. Law (2d ed.) 7, and cases cited; *Mittel v. Karl* (1890), 133 Ill. 65, 24 N. E. 553; *Indiana, etc., Oil Co. v. Grainger* (1904), 33 Ind. App. 559.

The instrument should be made consistent, by giving to all its parts their due weight. *Cravens v. Eagle Cotton Mills Co.* (1889), 120 Ind. 6, 16 Am. St. 298; *Boardman v. Reed* (1832), 6 Pet. *328, *345, 8 L. Ed. 415.

The law applicable to a contract is to be considered in construing it. *Pennsylvania Co. v. Clark* (1889), 2 Ind. App. 146.

Giving effect to the provisions for enforcing any act upon which default had occurred, as well as the other parts of the agreement, and considering the law applicable to a divisible contract, we do not think the
10. provisions of the contract are sufficiently definite to authorize us to exclude any remedy given by law to the parties to the agreement. Appellee obligated himself to pay appellants a sum of money upon a given date. This date was earlier than the date fixed for the delivery of the deed. When payment was refused and this suit filed, the act required of appellee was the payment of the money, according to the terms of the contract. To compel the per-

formance of this act, this suit was begun; and while, according to the technical meaning of the term, the suit is not for specific performance of the contract as a whole, it does, however, follow the contract, and seeks to enforce that provision upon which default had occurred when the suit was begun.

Considering all the provisions of the contract, and especially those fixing the time for paying the \$9,000, and delivering the deed, and the clause relating to the remedies to be pursued in case of default by either party, we think it reasonable to hold that the suit, as brought, was not denied appellants by the provisions of the contract. Appellee cannot be relieved from his obligation to pay in money by his own refusal to pay in property, by delivering to appellants the stock of goods mentioned in the contract. This leaves the two paragraphs of complaint under consideration upon the same footing. We therefore conclude that each paragraph was sufficient to withstand the demurrer.

The judgment is reversed, with instructions to the lower court to overrule the demurrer to the amended first and the third paragraphs of complaint, and for further proceedings in accordance with this opinion.

WAH KEE v. CLARK.

[No. 6,974. Filed October 11, 1911.]

1. LANDLORD AND TENANT.—*Complaint.—Failure to Allege Written Lease.—Presumptions.*—A complaint alleging that the plaintiff is the owner and entitled to the possession of certain premises, that defendant was a tenant by the year, that notice to deliver possession of the premises was served on him ninety days prior to the expiration of his tenancy, a copy thereof being made part of the complaint, and that defendant unlawfully holds over, is sufficient; and the presumption, in the absence of an allegation that the lease was in writing, is that it was oral. p. 463.
2. APPEAL.—*Motion to Make More Specific.—Assignments of Errors.*—The overruling of a motion to make more specific cannot be considered on appeal, where the assignment of errors does not present such alleged error. p. 464.

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3. *APPEAL.—Briefs.—Motion for a New Trial.*—Where neither the motion for a new trial, nor any of its grounds, are set out in appellant's brief, alleged error in the ruling thereon is waived. p. 464.
4. *LANDLORD AND TENANT.—Tender.—Answer.*—In an action by a landlord to recover possession of his property, an answer of tender by the tenant failing to allege the amount due, or to show any connection between the tender and the damages alleged in the complaint, the damages and the tender being for different amounts, or to show whether the tender was accepted, refused, or brought into court, is insufficient. p. 464.

From Lake Superior Court, *Virgil S. Reiter*, Judge.

Action by James T. Clark against Wah Kee. From a judgment for plaintiff, defendant appeals. *Affirmed.*

Crumpacker & Crumpacker and *John M. Stinson*, for appellant.

John F. Reilly and *J. A. Gavit*, for appellee.

HOTTEL, J.—This was an action begun before a justice of the peace for possession of real estate. From a judgment in favor of appellee, there was an appeal to the Lake Superior Court. In that court there was a trial, with a finding for appellee that he was entitled to the possession of the property, and \$237.50 damages for the detention thereof. On this finding the judgment was rendered from which this appeal was taken.

Original and supplemental complaints were filed, the sufficiency of each of which, as against a demurrer, is presented by the assignment of errors.

The only objection urged is that "the lease had been ratified by James T. Clark, appellee in this cause, and that it was not made part of the complaint." Neither

1. the original nor the supplemental complaint mentions any written lease. The original complaint alleges that appellee is the owner and entitled to the possession of the property; that appellant was a tenant by the year, and that his tenancy expired September 10, 1907; that notice to deliver the premises was served at least ninety days be-

fore the expiration of the tenancy, a copy of which notice is made a part of the paragraph; that "since the expiration of said tenancy plaintiff has been and now is entitled to the possession of said premises, and the defendant unlawfully holds over and detains the possession * * * from plaintiff." The allegations of the supplemental complaint are in all material respects the same, except that it proceeds on the theory that appellant was a renter by the month, but alleges the same date of expiration of tenancy and the same notice to deliver possession. There being no allegation that the lease, or rental contract, was in writing, the law indulges the presumption that it was oral. *Horner v. McConnell* (1902), 158 Ind. 280; *Crafton v. Carmichael* (1902), 29 Ind. App. 320. Both the original and the supplemental complaints seem to be good as against a demurrer, and are not open to the objection urged by appellant.

Appellant also urges against the complaint that

2. a motion to make it more specific should have been sustained, but there is no assignment of error presenting this question for review.

Alleged error of the court in overruling the motion for a new trial is urged, but neither the motion nor any of its grounds are set out in appellant's brief. The former

3. decisions of this court and the Supreme Court prevent a consideration of any question raised by this motion. *Tisdale v. State* (1906), 167 Ind. 83; *Talbott v. Town of New Castle* (1907), 169 Ind. 172; *Harrold v. Fuenfstueck* (1903), 31 Ind. App. 275; *Pittinger v. Ramage* (1907), 40 Ind. App. 486.

Complaint is also made of the ruling of the court in sustaining the demurrer to appellant's third paragraph of answer. This answer attempted to plead tender, but

4. failed to allege the amount, or any amount, due, or to show any connection between the tender and the damages alleged in the complaint, which was a different amount from the tender, and also failed to allege whether

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the tender was refused, accepted or brought into court. This paragraph of answer is clearly bad. Other questions are raised, but none that we think entitles appellant to a reversal.

Judgment affirmed.

CROUCH ET AL. v. LEWIS ET AL.

[No. 7,313. Filed October 11, 1911.]

1. **PLEADING.—Motions to Strike Out.—Redundant Matter.**—It is not erroneous to sustain a motion to strike from a pleading redundant, immaterial, or irrelevant matter. p. 466.
2. **SET-OFF AND COUNTERCLAIM.—Motion to Strike Out.—Partners.—Surplusage.**—In a counterclaim by defendant against plaintiffs, it is not erroneous to sustain a motion to strike therefrom allegations that the plaintiffs had been partners for many years and that defendant had been for many years in the general contracting business, where it is not alleged that plaintiffs entered into the contract in question as partners, such allegations being mere surplusage. p. 467.
3. **SET-OFF AND COUNTERCLAIM.—Redundancies.—Striking Out.**—It is harmless to strike from a counterclaim certain allegations, not improper in themselves, where substantially similar ones are left therein. pp. 467, 468, 469.
4. **SET-OFF AND COUNTERCLAIM.—Sufficiency.**—A counterclaim to be good must contain the averments necessary to a complaint for the same cause. p. 467.
5. **CONTRACTS.—Performance.—Complaint.**—A complaint for the breach of a contract must allege that the plaintiff has performed all the conditions thereof on his part, or show an excuse for his failure so to perform. p. 467.
6. **CONTRACTS.—Breach.—Answer.—Counterclaim.—Issues.**—Sustaining a motion to strike from a counterclaim an allegation that defendant had performed all the conditions of said contract on his part is erroneous, though harmless, where a paragraph of answer contained such allegation, and where the counterclaim was held sufficient on demurrer, the presumption being, where the evidence is not in the record, that evidence of such performance was not introduced, as, under the issues, it might have been. p. 467.
7. **SET-OFF AND COUNTERCLAIM.—Negating Defenses.—Striking Out.**—It is not erroneous to sustain a motion to strike from a counterclaim allegations negating a defense thereto. p. 468.
8. **APPEAL.—Briefs.—Waiver.**—Alleged errors not discussed are waived. p. 469.

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9. **CONTRACTS.—Breach.—Damages.—Anticipation of.**—A party who violates his contract is liable for such damages as proximately flow therefrom, if such damages could reasonably have been anticipated. p. 469.

From Hancock Circuit Court; *Robert L. Mason*, Judge.

Action by John E. Lewis and others against Larkin W. Crouch and others. From a judgment for plaintiffs, defendants appeal. *Affirmed.*

Felt & Binford, for appellants.

John F. Wiggins and *Cook & Cook*, for appellee.

IBACH, J.—This action was brought by appellees, to enforce an alleged liability for unpaid money on a building contract and bond executed by appellant Larkin W. Crouch, as principal, and appellants Jesse P. Cook and John H. Haskell, as sureties. Appellant Crouch had entered into a contract with the trustees of Delaware school township of Hamilton county, for the erection of a schoolhouse in said township, and had sublet to appellees a portion of the work to be done in erecting said schoolhouse. Appellees recovered judgment in the court below.

The errors relied on in the appeal arise on the ruling of the trial court on the motion of appellees, containing fourteen separate specifications, to strike out certain parts from the third paragraph of answer or counterclaim of appellant Crouch, in which he seeks to recover a judgment against appellees for nonperformance on their part of the same contract which they sued on. This motion was overruled as to specifications five, ten and twelve, but was sustained as to the remaining eleven specifications.

It is settled that there is no error in sustaining a

1. motion to strike out, where the part of the pleading objected to by the motion is redundant, immaterial or irrelevant. Elliott, App. Proc. §639, and cases cited.

Specification one, stricken out, was an allegation that plaintiffs had been partners continuously for more than two years, and that defendant Crouch had been engaged for

many years in the general contracting business. This

2. allegation was immaterial and mere surplusage, for it was nowhere alleged in the counterclaim that plaintiffs entered into the contract as partners, and the words embraced in this specification are mere *descriptio personae*.

Specification two was an allegation that defendant Crouch was held responsible for the work and action of a subcontractor. While this was not an improper allegation,

3. tion, the fact alleged appears sufficiently from the other facts pleaded in the counterclaim, and which were not stricken out, so that the striking out of this allegation was harmless.

The language stricken out because of specification three of the motion was an allegation that said defendant had fully performed his part of the contract.

A counterclaim to be good must contain all the
4. essential averments of a complaint. *Wabash Valley, etc., Union v. James* (1893), 8 Ind. App. 449; *Blaney v. Postal* (1894), 10 Ind. App. 131; *Stoner v. Swift* (1905), 164 Ind. 652.

An action on a contract for a breach thereof must allege, as to conditions precedent, that a party seeking to enforce said contract has complied with all the conditions

5. thereof, or must show a proper excuse for not doing so. *Mondamin, etc., Dairy Co. v. Brudi* (1904), 163 Ind. 642; *Collins v. Amiss* (1903), 159 Ind. 593; *Stoner v. Swift, supra*; *Magic Packing Co. v. Stone-Ordean, etc., Co.* (1902), 158 Ind. 538, and cases cited. Such being the well-settled principles of law, it was error for the court

6. to strike from the counterclaim the language of specification three, as the facts contained therein were not elsewhere alleged in the counterclaim. But it appears from the record that in his second paragraph of answer said defendant had averred full performance on his part of all the obligations by him to be performed under the allegations of the complaint, which averment is even more inclusive

than the allegation stricken from the counterclaim. The court below held the counterclaim good on demurrer, after the allegation in question was stricken out. As the answer contains in substance the same averment, the question of said defendant's performance became a part of the issues adjudicated at the trial. Since the evidence is not in the record, this court will presume that there was no evidence on this point as under the issues there might have been, and that this error did not harm appellant. *Clause Printing Press Co. v. Chicago, etc., Sav. Bank* (1896), 145 Ind. 682; *Anglemyer v. Blackburn* (1896), 16 Ind. App. 352.

It can be said of the allegations of the following specifications—namely, (4) concerning the time plaintiffs worked after the time stipulated by their contract for the
3. completion of the work; (7) as to plaintiffs' failure to have a sufficient force of workmen on the building to be able to complete it on time; (11) as to the loss occasioned by the hiring, by Crouch, of an extra carpenter, who was paid for time when he did not work, and as to the value of certain services rendered by such carpenter and by said defendant's foreman; and (13) alleging that the work done after the time stipulated for completion was made more expensive by cold weather—that they are sufficiently averred elsewhere in the counterclaim, and that the words stricken out add nothing to its force. The allegation of specification six—that defendant Crouch sublet to subcontractors the different parts of the construction of the building, except the carpenter work, which he did himself—is superfluous, since such of the facts alleged as are relevant appear elsewhere in the pleading.

Specification eight, which alleges that plaintiffs were not prevented by fire, or by circumstances over which
7. they had no control, from completing their part of the work on time, in addition to setting up matter which appears elsewhere, negatives a defense, and for that reason is superfluous. *Pine Civil Tp. v. Huber Mfg. Co.*

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- (1882), 83 Ind. 121. Appellant has waived the error
 8. assigned in the striking out of the language of specification nine, by failure to discuss it.

Specification fourteen alleges that plaintiffs knew at the time they entered into the contract that failure on their part to complete their portion of the work within the time
 3 stipulated would damage defendant Crouch. This fact substantially appears from other allegations; but such allegation is unnecessary, for one is liable on breach of contract for such damages as are the proximate re-
 9. sult of his failure to perform, if such damages could reasonably be foreseen, regardless of whether he actually knew that such damages would ensue. 8 Am. and Eng. Ency. Law (2d ed.) 561.

All the issues that the counterclaim was intended to present were presented at the trial after the striking out of the different portions that are assigned as error, and as we find no error shown by the record that we believe prejudicial to appellant, the judgment is affirmed.

Felt, J., not participating.

HUMPHREY ET AL. v. MOTTIER, ADMINISTRATOR.

[No. 7,471. Filed October 11, 1911.]

1. WILLS.—“*Unsound Mind.*”—*Statutes.*—The words “unsound mind,” as used in §3112 Burns 1908, §2556 R. S. 1881, providing that “all persons, except infants and persons of unsound mind, may devise,” etc., import such a degree of unsoundness of mind, as, measured according to the standard fixed by the adjudicated cases, incapacitates a person from making a will. p. 472.
2. DEEDS.—*Grantors.*—“*Unsound Mind.*”—*Statutes.*—The words “unsound mind,” as used in §3938 Burns 1908, §2917 R. S. 1881, providing that “persons of unsound mind and infants may not alien lands,” import such a want of mental capacity as, measured by the standard fixed by the courts, incapacitates a person from executing a deed. p. 473.
3. FRAUDULENT CONVEYANCES.—*Setting Aside.*—*Persons of Unsound Mind.*—*Complaint.*—*Conclusions.*—An allegation, in a complaint to set aside an alleged fraudulent conveyance, that said grantor “was for a long time prior to said proceeding of unsound

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mind, has so remained ever since, and is now of unsound mind," is not a legal conclusion, but is a sufficient allegation of such grantor's incapacity to execute the conveyance in question. *Batman v. Snoddy*, 132 Ind. 480, distinguished. p. 473.

4. FRAUDULENT CONVEYANCES.—*Setting Aside*.—*Misrepresentations*.

—*Complaint*.—A complaint to set aside an alleged fraudulent conveyance, averring that the defendants represented to the grantor that they had performed services for him equal in value to the property, and that they well knew they had been paid for all services rendered, when considered with the other allegations of the complaint in reference to the feebleness of the grantor and the weakness of his mind, sufficiently shows that the representations made were untrue. p. 475.

5. PLEADING.—*Reply*.—*Overruling Demurrer to*.—*When Harmless*.

—The alleged erroneous overruling of a demurrer to a paragraph of reply is harmless, where the judgment was not affected by any evidence admitted thereunder. p. 475.

6. APPEAL.—*Weighing Evidence*.—The Appellate Court will not weigh conflicting evidence. p. 475.

7. EVIDENCE.—*Opinions*.—*Insanity*.—In a suit to set aside an al-

leged fraudulent conveyance, evidence by a witness as to the conduct and conversations of the grantor at a time remote from the date of the execution of the deed in question, is admissible for the purpose of giving the basis for an opinion as to his mental condition at the time of the execution of the deed. p. 476.

From Switzerland Circuit Court; *Hiram Francisco*, Judge.

Suit by Hosier J. Harris, as guardian of John D. Mottier, a person of unsound mind (Eddie Mottier, as administrator of his estate, being substituted as appellee, upon such ward's death), against Lilly Humphrey and another. From a decree for plaintiff, defendants appeal. *Affirmed*.

William T. Friedley, George B. Hall, and Clore, Dickerson & Clayton, for appellants.

Leonard E. Smith and F. M. Griffith, for appellee.

LAIRY, C. J.—John D. Mottier on July 31, 1907, executed a deed, by which he conveyed certain real estate to his daughter Lilly Humphrey. He was afterward adjudged to be a person of unsound mind, and his guardian, Hosier J. Harris, brought suit against Lilly Humphrey and her husband, James Humphrey, to set aside the deed to said real

estate, and also to recover certain personal property alleged to have been transferred to appellants by appellee's ward before he was adjudged to be of unsound mind.

The complaint was in three paragraphs. The first paragraph, after making the necessary averments to authorize a suit by the guardian in his representative capacity, alleges that at the time of the execution of the deed, and for some time prior thereto, John D. Mottier was a person of unsound mind; that appellants knew his condition of mind, and procured from him the execution of the deed in question. It is further averred that the guardian disaffirmed the acts of said Mottier in the conveyance of said real estate, and demanded a reconveyance. The prayer of this paragraph is that the deed be set aside and the title quieted in said Mottier. The second paragraph proceeds upon the theory that said John D. Mottier was old and feeble in body and mind, and was susceptible to influence; that appellants exercised an undue and improper influence over him, and procured the conveyance of said real estate by such improper influence. As the finding and judgment of the court below were expressly based on the first and third paragraphs of complaint, no error can be predicated on the second, and it will not be necessary further to refer to it.

Appellants filed a demurrer to each paragraph of the complaint, on the ground that neither paragraph stated facts sufficient to constitute a cause of action. The action of the trial court, in overruling these demurrers, is one of the grounds assigned for a reversal.

Appellants take the position that the averment contained in the first paragraph of complaint, "that said Mottier was, for a long time prior to said proceeding, of unsound mind, has so remained ever since, and is now of unsound mind," is a conclusion, and is not a sufficient averment that his mental unsoundness was of such a character as to render him incapable of understanding the character of the transaction in which he was engaged at the time he made said

contract. It is contended that such a degree of mental unsoundness as rendered him incapable of transacting the ordinary affairs of life with discretion should have been shown by proper averments in the complaint, and that for the want of such averments the complaint is insufficient.

Section 3112 Burns 1908, §2556 R. S. 1881, provides as follows: "All persons, except infants and persons of unsound mind, may devise, by last will and testament, 1. any interest, descendible to their heirs, which they may have in any lands, tenements, and hereditaments, or in any personal property, to any person or corporation capable of holding the same." The Supreme Court of this State has frequently held that the phrase "of unsound mind," as used in said statute, means such a degree of unsoundness of mind as, measured according to the standard fixed by the adjudicated cases, incapacitates a person from making a will. *Blough v. Parry* (1896), 144 Ind. 463; *Runkle v. Gates* (1858), 11 Ind. 95; *Rush v. Megee* (1871), 36 Ind. 69; *Turner v. Cook* (1871), 36 Ind. 129; *Herbert v. Berrier* (1881), 81 Ind. 1; *Burkhart v. Gladish* (1890), 123 Ind. 337; *Bower v. Bower* (1895), 142 Ind. 194; *Wallis v. Luhring* (1893), 134 Ind. 447. In the case first cited the court said on page 489: "The meaning thus assigned to the phrase 'of unsound mind' by this court in construing the statute of wills was fully justified and founded in good reason. Because, according to Winslow, the phrase of unsound mind was first used by Lord Eldon to designate a state of mind not exactly idiotic, and not lunatic with delusions, but a condition of intellect between the two extremes, and unfitting the person for the government of himself and affairs. Taylor, Medical Jurisp. [11th Am. ed.] 678. To the same effect is *Den v. Johnson* [1819], 5 N. J. L. *455, 8 Am. Dec. 610. Thus we find that the phrase 'of unsound mind' had attained an appropriate and technical meaning in the law, conveying the idea of testamentary capacity according to the legal standards for such capacity. Another statute

in force at the time prescribing the rule for construing statutes provides that: 'Words and phrases shall be taken in their plain, or ordinary and usual sense. But technical words and phrases, having a peculiar and appropriate meaning in law, shall be understood according to their technical import.' §240 Burns 1894, §240 R. S. 1881."

The statute that specifies what persons may make conveyances is somewhat similar to the statute on the subject of wills, and is as follows: "Persons of unsound mind

2. and infants may not alien lands nor any interest therein." §3938 Burns 1908, §2917 R. S. 1881. The courts having held that the phrase "of unsound mind," as used in the statute of wills, hereinbefore quoted, is to be given a technical meaning, indicating a person who lacks testamentary capacity as defined by law, we can think of no reason why the same words used in §3938, *supra*, should not be given a similar technical meaning, and held to indicate a person who lacks mental capacity to convey real estate, when measured according to the standard fixed by the courts. Where a complaint to set aside a conveyance of real estate on account of the mental incapacity of the grantor avers that such grantor was of unsound mind at the date of said conveyance, it will be held that the phrase "of unsound mind" is used in the same sense in which it is used in the statute, and means that the grantor, by reason of his mental unsoundness, lacked requisite mental capacity to make a deed, as that capacity is defined by the adjudicated cases.

The question here presented has never been directly decided by either of the higher courts of this State, but it has been decided by the court of appeals of New York.

3. In the case of *Riggs v. American Tract Soc.* (1881), 84 N. Y. 330, the court said: "It is, however, seriously argued that some further allegation is necessary, 'that a person who is merely of unsound mind is not necessarily or even presumptively incapable of making such a dis-

position of his property.' But in no other words could the pleader so well state the exact point to which the jury or the trial court must come before a decision is rendered in favor of the plaintiff. In *Ex parte Barnsley* [1744], 3 Atk. 168, to an inquisition, 'whether B. is a lunatic,' the return was that 'from weakness of mind he is incapable of governing himself, and his lands and tenements;' and on motion to quash there was much debate as to its effect, whether sufficient or not. It was held bad, partly because the words in sense and meaning were not equivalent to the answer sought by the inquisition, and partly because the return was not easily traversable. The chancellor, saying after reference to investigation of the records that the proper return was '*lunaticus or non compos mentis*' or '*insana mentis*;' or since the proceedings have been in English, of 'unsound mind,' which he says 'amounts to the same thing.' Thus the fact to be found might be expressed in either of these ways. They all import a total deprivation of sense, and he adds, "courts of law understand what is meant by *non compos* or *insane*, as they are words of a determinate signification,' and, as before stated, either expression is represented in English by the words used in this complaint. The allegation is, that Ira Riggs was of 'unsound mind,' not as a conclusion of law, but a fact founded upon other facts, some or all of which it may be necessary to prove, but only when issue is taken upon the one alleged."

The case of *Batman v. Snoddy* (1892), 132 Ind. 480, is sometimes cited as authority for the proposition that a pleading that proceeds upon the theory that a person is of unsound mind, without stating the facts indicating unsoundness, is insufficient on demurrer. 31 Cyc. 59. The opinion in that case does not set out the complaint, or recite its substantial averments. The language used by the court in holding the complaint insufficient is susceptible of the meaning placed upon it by the text before referred to, but an examination of the complaint discloses the fact that

it does not contain an averment that the grantor was of unsound mind. It is therefore apparent that the question presented here could not have been decided in that case.

A demurrer was overruled to the third paragraph of the complaint, and this ruling is assigned as error. The only

objection urged to this paragraph is that it is not

4. alleged that the representations made to influence the grantor were untrue. It is alleged in this paragraph that appellants represented to said Mottier that they had performed services for him equal to the value of all the property owned by him, and that they well knew that they had been paid for all services rendered. This averment, when considered in connection with the other averments of the complaint in reference to the weak and enfeebled condition of the grantor's mind, and his susceptibility to improper influences, and the knowledge of these facts possessed by appellants, overcomes the objection urged against this paragraph of complaint.

It is also claimed on behalf of appellants that the trial court erred in overruling their demurrer to the third para-

graph of appellee's reply to their second paragraph

5. of answer. This reply set up the six-year statute of limitations. It clearly appears from the judgment of the court that such judgment was not affected by this paragraph of pleading, or by any evidence admissible thereunder. Appellant Lilly Humphrey was allowed \$1,170 on the claim for services, set up in her second paragraph of answer. Had the court found in appellee's favor on the paragraph of reply under consideration, such a judgment could not have been rendered. The error, if any, in overruling this demurrer did not harm appellants.

We are asked to reverse the judgment on the ground that the evidence is insufficient to sustain the verdict. The evi-

dence is voluminous and conflicting upon the question

6. of the mental condition of John D. Mottier. An examination of the evidence convinces us that there is

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some evidence upon every material fact necessary to sustain the finding and judgment of the court. As this court will not weigh conflicting evidence, the judgment cannot be disturbed on this ground.

Complaint is also made of the action of the trial court in permitting witnesses to describe the conduct of said Mot-

tier, and to detail the conversations with him at times

7. remote from the date of the execution of the deed, and to give an opinion as to whether he was of sound or unsound mind, based on the conduct or conversations so detailed. In the case of *Staser v. Hogan* (1889), 120 Ind. 207, the Supreme Court, speaking upon this subject said: "We think that this witness was competent as to all matters appearing in her testimony. *Lamb v. Lamb*, [(1886), 105 Ind. 456]. If she was competent to give an opinion as to the mental condition of the testator, she was competent to give a statement of all she knew about him, both before and after it is claimed that his mind failed, together with what he did and said, and the change, if any, in his manner, with a view of enabling the jury to weigh such opinion when given; indeed, without such statement she could not be permitted to give her opinion." The court committed no error in admitting evidence of this character.

Finding no error, the judgment is affirmed.

VOSS v. CAPITAL CITY BREWING COMPANY.

[No. 7,316. Filed October 13, 1911.]

1. LANDLORD AND TENANT.—*Possession.—Failure to Give.—Answers.*—In an action by a landlord for rent, answers by the tenant that the landlord failed to yield possession of the leased premises are sufficient. p. 479.
2. LANDLORD AND TENANT.—*Leases.—Implied Covenant for Possession and Quiet Enjoyment.*—Every lease contains an implied covenant for possession and quiet enjoyment. p. 479.
3. LANDLORD AND TENANT. — *Leases. — Subletting. — Evidence. — Weighing.—Appeal.*—Evidence that the plaintiff leased to defendant certain property, agreeing to yield possession at the ex-

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piration of the existing tenancy, that the defendant lessee was authorized to collect the rents for the remainder of the existing tenancy, that defendant collected such rents, accounting therefor to the plaintiff, that no notice to quit was given to determine the existing lease and the lessee held over, and that the defendant lessee paid rent for five months, will not be weighed on appeal, where there is evidence in conflict therewith sufficient to support the decision of the court. p. 479.

From Superior Court of Marion County (75,062); *Lawson M. Harvey*, Special Judge.

Action by Jay G. Voss against the Capital City Brewing Company. From a judgment for defendant, plaintiff appeals. *Affirmed.*

Caleb S. Denny, George L. Denny, William F. Elliott and Horace L. Gould, for appellant.

Elmer Wetzel, for appellee.

ADAMS, J.—On May 9, 1907, appellant leased certain real estate in the city of Indianapolis to appellee, for a term of five years from June 1, 1907, at a rental of \$30 a month for the first two years, and \$35 a month for the remaining three years. The lease was in the usual form, except for a provision “that the tenant now occupying the above-described premises is not to be disturbed during the term of his present liquor license, provided he pays the above rent.” Appellee failed to pay the rent for the months of November and December, 1907, and appellant brought suit to collect it.

The one paragraph of complaint sets out a copy of the lease, and avers failure to pay the rent, as therein provided. Appellee answered in three paragraphs. The second paragraph alleges that appellant did not deliver possession of the leased premises to appellee on June 1, 1907, notwithstanding the tender of payment, and that there was, therefore, a failure of consideration. The third paragraph of answer alleges that appellee paid appellant the stipulated rent of \$30 a month, for five months from June 1, and demanded from appellant possession of said premises, which

was, and ever since has been, refused; that during the five months appellee paid rent to appellant, the occupant of said premises left with appellee, at its office, the sum of \$16 on the first day of every month, but received no receipt therefor, and that all the money so left by said occupant was tendered to appellant by appellee on November 1, 1907.

Appellant demurred separately and severally to the second and third paragraphs of answer for want of sufficient facts to constitute a cause of defense. The court overruled the demurrer to each paragraph, and appellant replied in two paragraphs to the second and third paragraphs of answer. The second paragraph of reply admits that appellee has not been in actual possession under said lease, but alleges that, at the time it so executed said lease, appellee, through its duly authorized agent, undertook and agreed to collect from the tenant then in possession the rent due from such tenant to appellant up to June 1, 1907, and to remit it to appellant; that said agent did collect said rent from the occupying tenant, for and on behalf of appellee, and also collected rent due to appellee for the use and occupancy of said premises after June 1, 1907; that appellee then and there gave to said occupying tenant a receipt for said rent so collected, which, in law, constituted said occupant a tenant for one year from said time, at the same monthly rental as he had theretofore paid appellant, to wit, \$16 a month; that said receipt was so given to said occupant by appellee without the knowledge or consent of appellant, and that appellee thereby made it impossible for appellant to put appellee in possession of said premises, because said occupant has, with right, retained possession thereof; that appellant has never accepted any rent from said occupant, nor recognized him as a tenant since the execution of the lease, but that appellee at said time accepted said occupant as its subtenant; that the inability of appellant to put appellee in possession was due to the terms of the contract of sub-

tenancy, made by appellee, and not to any act or default of appellant.

The cause was submitted to the court without a jury. The finding and judgment was that appellant take nothing, and that appellee recover its costs. Motion for a new trial, on the grounds that the decision of the court is contrary to law, and is not sustained by sufficient evidence, was filed and overruled. Errors assigned and relied on for reversal in this court are (1) the overruling of appellant's demurrer to the second paragraph of appellee's answer; (2) the overruling of appellant's demurrer to the third paragraph of appellee's answer; (3) the overruling of appellant's motion for a new trial.

There was no error in overruling the demurrer to the second and third paragraphs of answer. A landlord

1. is bound to put his lessee in possession of the leased premises, and is liable for damages if he fails to do so. *Hammond v. Jones* (1908), 41 Ind. App. 32.

A covenant for quiet enjoyment is implied in every mutual contract for leasing land, by whatever form of words the agreement is made. *Hoagland v. New York, etc.,*

2. *R. Co.* (1887), 111 Ind. 443, 446, and cases cited.

"Every lessor binds himself to give possession, and not to give the party to whom he demises a mere right to take possession of a wrongdoer by an action of ejectment; and every lessee binds himself to accept possession and pay rent." 2 Addison, Contracts (3d Am. ed.) §690. See, also, *Hickman v. Rayl* (1877), 55 Ind. 551, 557, and cases cited.

The remaining error assigned—that of overruling the motion for a new trial—is predicated on the insufficiency of the evidence to sustain the decision of the court. It

3. is claimed by appellant that an agent of appellee accepted rental from the occupying tenant at the prior rate, thus extending the tenancy for a year, the occupant becoming appellee's subtenant. The question presented, therefore, becomes one of fact to be determined from the

evidence in the record. We have carefully read the evidence, which discloses that one Krauss was the occupying tenant, holding a monthly tenancy at a rental of \$16 a month, payable in advance; that the rent was due on or about the eleventh day of each month; that the sum of \$12.22 was due to appellant for the balance of the month of May; that appellee's agent had agreed to collect this balance from the tenant; that the agent did collect said amount, and it was paid to and retained by appellant; that on June 1, Krauss left at appellee's office the sum of \$16, and a like sum on the first day of each month, up to and including October, all of which was tendered to appellant on November 1; that appellee paid to appellant for five months the rent stipulated in the lease, and did not pay after November 1. As to these facts there is no dispute. It also appears in evidence that appellee's agent collected the balance due for the month of May, at the request of appellant, and at the time collection was made he informed Krauss that he was collecting the rent for appellant; that at the same time he informed Krauss that the premises had been leased to appellee from June 1, after which time the rental would be \$30 a month. As to the truth of these statements, however, there is a sharp conflict in the testimony. We are not called on to reconcile this conflict, or to determine upon which side is the preponderance. There was some evidence before the court to support the finding and judgment, and, this being true, we cannot reverse a judgment upon the weight of the evidence alone.

The judgment is affirmed.

VAWTER, ADMINISTRATOR, v. FRAME ET AL.

[No. 7,354. Filed October 13, 1911.]

1. LANDLORD AND TENANT.—*Rents.—Parts of Crop.—Life Tenants.—Remaindermen.*—Rents due to a life tenant at his death are collectible by his personal representative; but grain rent, to be paid at threshing time, is not due until such time, and, being annexed to the real estate, descends with the reversion to the remaindermen. p. 483.
2. LIFE ESTATES.—*Crops.—Remaindermen.*—Growing annual crops belonging to a life tenant constitute personal property and pass at her death to her estate. p. 483.
3. LANDLORD AND TENANT.—*Leases.—Cropping on Shares.—Tenancies in Common.—Remainders.*—A lease executed by the life tenant of a farm, providing that the lessee should “in a good and husbandlike manner * * * break and plow said parts of said land so let and rented to him, * * * and * * * deliver one-third of all the grain * * * to said [lessor], as the part, interest and share of said annual crop * * * to be so received by, and belonging to, said [lessor], * * * said [lessee] to receive as his part, and in payment for the work and labor done by him, and expenses incurred by him in the production of said * * * crops, two-thirds of * * * the grain * * * together with the straw,” the life tenant occupying the farm and directing the sowing of the crops, and the manner thereof, constitutes the parties thereto tenants in common of the crops raised, the words “let” and “rent” being in common use in describing cropping arrangements, regardless of their technical legal meaning; and upon the death of the life tenant before a division of the crop, her share passes to her personal representative, and not to the remainderman. p. 483.

From Pike Circuit Court; *John L. Bretz*, Judge

Action by John W. Frame and another against William C. Vawter, as administrator with the will annexed of the estate of Matilda Frame, deceased. From a judgment for plaintiffs, defendant appeals. *Reversed.*

DeWitt Q. Chappell, for appellant.

A. J. Rutledge, S. B. Hatfield, H. F. Fulling and *W. S. Hatfield*, for appellees.

IBACH, J.—Matilda Frame, under the terms of her husband's will, was the life tenant of a farm in Warrick county. In July, 1907, she made an agreement with John H. Sasse, whereby he was, under her direction, to cultivate parts of the farm in wheat, and was to deliver to her at threshing time, as her part of the crop, one-third of the grain raised. Mrs. Frame died in February, 1908, before the maturity of the crop sown by Sasse in accordance with his agreement. After the wheat was threshed, the third part that was to come to Mrs. Frame was claimed by both Mrs. Frame's administrator, on behalf of the devisees and legatees under her will, and appellees, the remaindermen in fee of the land under the will of Mrs. Frame's husband. By agreement the administrator was allowed to sell the wheat and keep the proceeds, in lieu thereof, pending settlement by the court. Appellees filed a claim against defendant for the value of the wheat, and the cause was tried without a jury on an agreed statement of facts, which contained all the evidence in the case. The court found that there was due to appellees, for rent of lands cultivated by the tenant of said decedent, the full amount held by the administrator to abide the event of this action, and ordered him to pay over to appellees such sum received for the wheat sold.

Twenty errors are assigned, but the consideration of those assigning that the decision of the court is not sustained by sufficient evidence and is contrary to law will be sufficient, in view of the disposition made of the case.

Appellees base their claim on the following statute: "When a tenant for life who shall have demised any lands shall die on or after the day when any rent becomes due and payable, his executor or administrator may recover from the undertenant the whole rent due; if he die before the day when any rent is to become due, they may recover the proportion of rent which accrued before his death, and the remainderman shall recover the residue." §8069 Burns 1908, §5223 R. S. 1881.

Rents due to a life tenant, at his death are collectible by his personal representative. Rents have not accrued until they become due, and grain rent, to be paid at thresh-

1. ing time, does not become due until that time. Rents, until they become due, are annexed to the real estate, and thus go with the reversion to the remainderman. *Lowrey v. Reef* (1891), 1 Ind. App. 244; *King v. Anderson* (1863), 20 Ind. 385; *Watson v. Penn* (1886), 108 Ind. 21, 58 Am. Rep. 26; *Henry v. Stevens* (1886), 108 Ind. 281; *Murray v. Cazier* (1900), 23 Ind. App. 600.

But growing annual crops belonging to a life tenant are a part of his personal property, and, at his death, go

2. to his estate. §2777 Burns 1908, §2260 R. S. 1881; *Kluse v. Sparks* (1894), 10 Ind. App. 444; *Austin v. McMains* (1896), 14 Ind. App. 514. *Shaffer v. Stevens* (1896), 143 Ind. 295. Both of these principles are fully settled, and are firmly incorporated in the law of our State, by statute and by judicial interpretation.

The controlling questions in the present case are whether, under the contract with Mrs. Frame, Sasse leased the lands cultivated, and was her tenant, or whether he was a

3. cropper, and thus a tenant in common of the crop with her. If the contract is a lease, creating the relation of landlord and tenant, and the third part of the grain was to go to Mrs. Frame as rent, appellees should recover under the statute; but if the contract is a cropping agreement, creating the relation of tenants in common in the crop, appellant must recover, for in such case Mrs. Frame was, at the time of her death, the owner of an undivided interest in the growing wheat. The decisions of the courts are not entirely in harmony in interpreting contracts where one farms the lands of another, and the crops are divided. Usually, if the contract is for a single season it is held not to be a lease. The case of *Scott v. Ramsey* (1882), 82 Ind. 330, holds that even if such an agreement be con-

sidered a lease, the parties are tenants in common of the crop.

In the case of *Chicago, etc., R. Co. v. Linard* (1884), 94 Ind. 319, 48 Am. Rep. 155, the court, after reviewing many cases, said: "The sounder view undoubtedly is, that where the terms of the contract are such as to show that the contracting parties understood and intended that the relation of landlord and tenant should be created thereby, the contract will be a lease, although the landlord is to be compensated for the use of the land by a portion of the crops raised." The case of *Louisville, etc., R. Co. v. Hart* (1889), 119 Ind. 273, 4 L. R. A. 549, holds that where, under an arrangement between the owner of land and another person, the latter harvests the hay grown upon the land, and gathers the whole in stacks, he to have three-fifths, and the landowner two-fifths, they are tenants in common of the hay in the stacks.

The announcement in the case of *Chicago, etc., R. Co. v. Linard, supra*, is in harmony with the following general rule, announced in 24 Cyc. 1466: "The intention of the parties as expressed in the language they have used, interpreted in the light of the circumstances, controls in determining whether or not a given contract constitutes a lease. Where there is a reservation in the agreement of a certain portion of the crop as rent *eo nomine* this necessarily constitutes a lease, and creates the relationship of landlord and tenant between the parties." In the leading case of *Warner v. Abbey* (1873), 112 Mass. 355, the court said: "In construing contracts for the cultivation of land at halves, it is impossible to lay down a general rule, applicable to all cases; because the precise nature of the interest or title between the contracting parties must depend upon the contract itself, and very slight provisions in the contract may very materially affect the legal relations of the parties and their consequent remedies for injuries as between themselves. In some cases, the owner of the land gives up the entire pos-

session, in which event it is a contract in the nature of a lease with rent payable in kind; in other cases, he continues to occupy the premises in common with the other party, or reserves to himself that right, and so a tenancy in common to that extent is created, and each is entitled to the joint possession of the crops, or the possession of the one is the possession of the other, until division; or he may retain the sole possession of the land, and the other party may have the right to perform the labor and receive half the crops as compensation; or the two parties may become tenants in common of the growing crops, while no tenancy in common as such exists in the land."

In a subject note on croppers in the case of *Kelly v. Rummerfield* (1903), 98 Am. St. 951, 953, the rules are thus stated: "It appears from the authorities that the question to be determined in every case of cultivation of land on the shares, when the agreement between the parties is open to more than one construction, is, Does the contract give the landowner his share as rent or the occupant his share as compensation for his labors? If the former, the person working the land is a tenant. If the latter, he is simply a cropper. * * * Every form of contract by which the use of land is given to one who is to cultivate it and give the owner as compensation therefor a share of the produce, creates a tenancy in common in the crop. The principle is everywhere observed that when one farms the land of another under an agreement by which he is to give the landowner a part of the crop raised, he and such owner, in the absence of stipulation to the contrary, become tenants in common of the crops raised, until a final division is made." However, the last two sentences quoted carry the rule further than is necessary for us to do in determining the case before us.

In order to determine whether the contract under consideration is a lease or a cropping agreement, it becomes our duty to ascertain, as clearly as possible, what relation the

parties intended to create between themselves. The contract, as set out in the agreed statement of facts, follows:

“Said Sasse shall, in a good and husbandlike manner, in the months of July, August and September, break and plow said parts of said land so let and rented to him, and shall immediately thereafter so harrow and prepare said ground that it will be in good and proper condition to sow and drill wheat thereon, and that at the proper time in either the month of September or October of said year said Sasse shall drill and seed said land in wheat, said Sasse to furnish the seed so sown on said land, and that thereafter at the wheat-harvest time in the following year, and at the proper time to cut, reap and save said wheat, said Sasse shall cut, reap and save said wheat, and that as early thereafter as it can safely and properly be done, said Sasse is to have all of said wheat so sown and raised by him properly threshed and cleaned, and is to deliver one-third of all of the grain of said wheat to said Matilda Frame, at the place where it is threshed, as the part, interest and share of said annual crop of wheat to be so received by, and belonging to, said Matilda Frame; and said Sasse is to receive as his part, and in payment for the work and labor done by him, and expenses incurred by him in the production of said wheat crop, two-thirds of the full amount of the grain of said crop, together with the straw severed and removed from said real estate.”

This contract, as set out, is somewhat ambiguous. The lands are not specifically described, and no mention is made of a specific term. One statement is that the land was “let and rented,” but it is later stated that Sasse was to deliver one-third of the grain to Matilda Frame at the threshing place “as the part, interest and share of said annual crop of wheat to be so received by, and *belonging to*, said Matilda Frame, and said Sasse is to receive as his part, and *in payment for the work and labor done by him, and expenses incurred by him in the production of said wheat crop*,” (our italics) two-thirds of the grain, together with the straw. The part to be received by Mrs. Frame is not described as rent, but as the interest and share already belonging to her. Sasse was to receive the two-thirds remaining, to-

gether with the straw, as his part, and in payment for the work and labor done by him and expenses incurred. These words clearly import not a lease, but a cropping agreement, under which a tenancy in common in the crop was intended by the parties and implied by law. It further appears, in evidence, that Mrs. Frame remained in possession of the farm, dwelling on it; that Sasse cultivated only parts of it; that Mrs. Frame directed as to what parts should be sown, and the way in which it was to be done. On considering these facts, in connection with the phraseology of the contract, we are constrained to hold that the agreement between Mrs. Frame and Sasse was a mere cropping contract, and not a lease; and that at all times after the planting of the crop Mrs. Frame was the owner of an undivided interest in it, she and Sasse being tenants in common of the crop. Therefore, the lands cultivated in wheat were not leased or demised within the meaning of §8069 Burns 1908, §5223 R. S. 1881, and the third part of the grain, which came to Mrs. Frame, was her personal property, and, under §2777 Burns 1908, §2260 R. S. 1881, should be inventoried in her personal estate, and go to her personal representative.

In so construing the contract between Mrs. Frame and Sasse, we are not unmindful of the use of the words "let and rented" in the contract, as set forth in the agreed statement of facts, nor of the use of the same words and the term "rental agreement," as applied to the same contract several times in the agreed statement. We know that these words are in common use to describe any arrangement whereby one person cultivates the land of another for a portion of the crop, without regard to their legal significance. The real status of the parties is to be determined from the incidents of the contract, and the duties which each is to perform.

In the case of *Harrison & Son v. Ricks* (1874), 71 N. C. 7, the court said, while considering the interpretation of

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contracts for cultivating lands in which the owner receives a portion of the crop, and the cultivator a portion: "Which of these characters [tenant or cropper] an occupier bears depends entirely on the agreement between the parties. * * * If the contract clearly conveys the land to a lessee for a term, in the absence of some contrary and controlling provision, the lessee is a tenant. But generally, when the contract is oral or inartificially drawn, it is left doubtful whether an estate in the land was intended to pass. In such case the intent, one way or the other, must be inferred from the other provisions of the agreement. The use of the word 'rent,' as that the owner has 'rented' his land to another, has, by itself, but little weight in the interpretation of an oral or inartificially and obscurely written contract." In the case of *Walls v. Preston* (1864), 25 Cal. 59, the court said: "If the agreement contains terms which by themselves would import a lease, and other terms which provide for a division of the crops, and it is doubtful which it is—a lease or a cropping contract—it will be deemed a cropping contract, by reason of a division of the crops."

It is unnecessary to consider the other errors assigned. The judgment of the court below is reversed, and the court directed to enter judgment for appellant.

GUBBINS v. HARRINGTON.

[No. 7,134. Filed October 13, 1911.]

1. MUNICIPAL CORPORATIONS.—*Street Improvement Assessments.—Waiver.—Personal Liability.*—A waiver executed by a frontager cuts off his right to make a defense to a street improvement assessment for anything appearing or omitted in the assessment proceedings, and makes him personally responsible for the deficit of cost and interest existing after the sale of the assessed lot on foreclosure of the lien. p. 490.
2. MUNICIPAL CORPORATIONS.—*Street Improvement Assessments.—Foreclosure.—Complaint.—Conditions Precedent.—Abatement.*—A complaint to foreclose a street improvement lien that falls to

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allege the giving of the requisite notice to defendant to pay the amount due, is bad both as to the enforcement of the lien and as to the securing of a personal judgment. p. 490.

3. MUNICIPAL CORPORATIONS.—*Street Improvement Assessments.—Statutes.—Contracts.*—Street improvement liens are statutory; and the remedy for enforcing them may be altered by the legislature at any time before contract rights intervene. p. 490.
4. MUNICIPAL CORPORATIONS.—*Street Improvement Assessments.—Liens.—Foreclosure.—Notice.—Abatement.*—Under §8721 Burns 1908, Acts 1907 p. 550, §3, providing that no person who has filed a waiver in a street improvement proceeding shall be sued unless “served with fifteen days’ personal written notice of such delinquency,” a suit filed without the giving of such notice may be abated. p. 491.
5. APPEAL.—*Mandate.—Death.*—Where a party dies after the submission of a case on appeal, the judgment rendered will be entered as of the date of submission. p. 491.

From Jay Circuit Court; *John F. LaFollette*, Judge.

Suit by John Gubbins against Catherine Harrington. From a judgment for defendant, plaintiff appeals. *Affirmed.*

Edward R. Templer and *Van L. Ogle*, for appellant.

George T. Whitaker, for appellee.

MYERS, J.—Appellant brought this suit against appellee to foreclose a street assessment lien and for personal judgment. To the complaint a plea in abatement was filed, and a demurrer thereto was overruled. Appellant refused to plead further, and a judgment abating the suit was rendered in favor of appellee and against appellant for costs.

The improvement was made, the assessment was perfected, a waiver was filed, and improvement bonds were issued and delivered to the contractor, pursuant to an act of the General Assembly approved March 6, 1905 (Acts 1905 p. 219). The first instalment of the assessment was due and payable on June 1, 1908, and this suit was commenced July 22, 1908.

It is admitted that fifteen days’ personal written notice was not given to the delinquent before commencing this suit, as provided by an act of the General Assembly approved

March 12, 1907 (Acts 1907 p. 550, §§1-3, §§8715, 8720, 8721 Burns 1908). This act amends §§110, 115, 116 of the act of 1905, *supra*. The only question now presented is, Does §8721, *supra*, control the manner of procedure for the collection of the delinquent instalment by the bond owner, or shall he proceed under the act as originally passed?

Appellant contends that if the plea of appellee should be held good as against his right to foreclose his lien, it is not sufficient to abate his right to a personal judg-

1. ment. The waiver executed by appellee cut off his right to make a defense for anything appearing or omitted in the proceedings affecting the legality of the assessment (*Dunkirk Land Co. v. Zehner* [1905], 35 Ind. App. 694), and made him "responsible for any deficit of such cost and interest, after the sale of the lot on foreclosure of the lien." *Wayne County Sav. Bank v. Gas City Land Co.* (1901), 156 Ind. 662. From the case last cited, it will be

seen that appellee's personal responsibility extends

2. only to make good any deficit after applying the proceeds arising from a foreclosure sale of the lot. Therefore, if appellant must first subject the lot assessed to the payment of his demand, before subjecting any of the other property of appellee to sale for that purpose, it must necessarily follow that unless appellee has complied with the conditions precedent to bringing his suit to foreclose his lien, the suit not only for such foreclosure must abate, but likewise any suit for personal judgment.

For the assessed cost of a street improvement, the contractor has a lien on the real estate abutting on the improved portion of the street. This lien is given by statute,

3. and is a remedy which the legislature may modify at any time before rights have become vested, or when such change does not impair a contract right, or substantially deprive a person of adequate means of enforcing his right. *Davis v. Rupe* (1888), 114 Ind. 588, and cases cited; *Shirk v. Thomas* (1889), 121 Ind. 147, 16 Am. St. 381;

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State, ex rel., v. Helms (1894), 136 Ind. 122. As applicable to the case before us, there has been no legislative
4. change which seriously, or even substantially, affects the mode of enforcing the right given to appellant under the old statute. Section 8721, *supra*, gives appellant a complete remedy for the collection of the assessment due to him, by a foreclosure of his lien. It provides that “when any person shall default in the payment of any instalment of principal or interest it shall be the duty of the treasurer to mail a notice of such delinquency to such person, who shall have thirty days from the date when the same was payable to pay such instalment with a fee to such treasurer of twenty-five cents for sending such notice: Provided, that no such suit shall lie or be filed unless and until the person owning the property covered by such lien or assessment, and who has availed himself of the privilege of paying the instalments, is served with fifteen days’ personal written notice of such delinquency.”

Appellant has not complied with the provision of the statute requiring fifteen days’ notice to the owner of the property assessed. The demurrer to the plea in abatement was properly overruled.

As it appears that since the submission of this cause in this court appellant has died, it is therefore ordered
5. that the judgment in this case be affirmed as of the date of said submission.

Judgment affirmed.

HOLDERMAN v. TOWN OF NORTH MANCHESTER.

[No. 7,295. Filed October 13, 1911.]

1. MUNICIPAL CORPORATIONS. — *Street Assessments. — Statutes. — Amendments.—Saving Clauses.*—Section four of the act of 1909 (Acts 1909 p. 412) providing that any aggrieved lot owner may appeal to the circuit court from his assessment, repeals that part of §8716 Burns 1908, Acts 1905 p. 219, §111, providing for the appointment by the court of appraisers to reassess the benefits; and as there is no saving clause to such act of 1909,

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the court is powerless to proceed under such §8716 with a petition theretofore filed in accordance therewith. p. 493.

2. MUNICIPAL CORPORATIONS.—*Street Assessments.—Petition to Appoint Appraisers.—Appeal.*—The rights and remedies in street improvement proceedings are entirely statutory; and a petition, under §8716 Burns 1908, Acts 1905 p. 219, §111, for the court to appoint appraisers to reassess the benefits to petitioner's lot, does not constitute an appeal to the circuit court; and the court is without jurisdiction to hear judicially any matter connected with such assessment. p. 494.
3. MUNICIPAL CORPORATIONS.—*Street Assessments.—Conclusiveness of.—Appeal.*—No appeal lies from a street assessment made pursuant to §8716 Burns 1908, Acts 1905 p. 219, §111, providing that the boards of public works shall assess the abutting lots for the cost of street improvements, and that if the owner of any lot is aggrieved he may petition the circuit court for the appointment of appraisers, whose report shall be "final and conclusive." p. 494.
4. APPEAL.—*Jurisdiction.—Dismissal.—Street Assessments.*—The Appellate Court has no jurisdiction of an appeal from an order of the circuit court in a street assessment proceeding, where the circuit court had none. p. 494.

From Wabash Circuit Court; *A. H. Plummer*, Judge.

Street improvement proceeding by the Town of North Manchester. From the assessment made, Esther Holderman appeals. *Appeal dismissed.*

Lesh & Lesh and *C. M. Holderman*, for appellant.

Sayre & Hunter, for appellee.

FELT, P. J.—Appellant is the owner of lot one, in the town of North Manchester, which was assessed for street improvements in the sum of \$1,535. Being aggrieved on account of the assessment, she petitioned the judge of the Wabash Circuit Court to appoint three disinterested freeholders to reassess the benefits to said lot. On February 15, 1909, the court appointed such appraisers, who duly qualified, and on April 19, 1909, filed their verified report, showing that they were unable to agree on the benefits to the property, and thereupon the court discharged them. On May 1, 1909, appellant, in writing, requested the court to grant a trial in said court, without a jury, to ascertain the benefits to said

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real estate, which request was denied by the court, and thereafter appellant filed her written motion for the appointment of new appraisers, which motion was overruled by the court. Appellant excepted to the action of the court in refusing to try the case, or to appoint new appraisers, and from the judgment against her for costs, prayed, and was granted, an appeal to this court.

The errors assigned question the action of the court in overruling the motion and request for a trial, and in overruling the petition for the appointment of new appraisers.

The proceedings for the improvement of the street were maintained under §111 of the act of 1905 (Acts 1905 p.

219, §8716 Burns 1908). During the pendency of

1. the proceedings, said section was amended by the act of March 8, 1909 (Acts 1909 p. 412, §4), to which an emergency clause was attached. The amending act contains no saving clause, as to pending assessments or litigation, and therefore took away all power to proceed further under the provisions so repealed. *Taylor v. Strayer* (1906), 167 Ind. 23, 119 Am. St. 469; *Zintsmaster v. Aiken* (1909), 173 Ind. 269. The section before amendment provided for the appointment of appraisers by the court, when petitioned to do so, to assess the benefits, and the section as amended provides for an appeal from the assessment made by the town board to the circuit court, and a trial of the case by the court without a jury, "as other civil cases." The section, both before and after amendment, provides that the petition seeking to modify the assessment must be filed within ten days after the final order of the board approving the assessment, and that when the assessment roll is completed and delivered, as therein provided, "the decision of such board as to all such benefits shall be final and conclusive," and then follows the foregoing provision for reviewing the assessment, formerly by appraisers, after the amendment, by trial in the circuit court.

It is clear that the court did not err in refusing to ap-

point new appraisers, for when the request was made, there was no law in force authorizing such appointment.

Statutory proceedings for the improvement of streets and for the assessment of the cost thereof are special in character, and no right of appeal can be asserted there-

2. under, except that expressly provided by the special statute itself. The application for a reassessment of benefits was not an appeal to the circuit court, and the court acquired no jurisdiction by reason thereof, and could exercise no judicial power in the proceedings, but acted only in a ministerial capacity—except as to costs—from which no right of appeal to this court arises. As the circuit court had no jurisdiction to exercise judicial power, there could be no further remedy under either the old or the amended statute, as is the case where jurisdiction exists, and the amendment to the statute only modifies the proceedings, and provides a substantially similar remedy. *Mayne v. Board, etc.* (1890), 123 Ind. 132; *Pittsburgh, etc., R. Co. v. Oglesby* (1905), 165 Ind. 542.

It has been decided that there is no appeal under this provision of the statute, that the action of the appraisers is final and conclusive, and that the court has no judi-

3. cial power in such proceeding. *City of Huntington v. Brown* (1911), 175 Ind. 709; *City of Indianapolis v. State, ex rel.* (1909), 172 Ind. 472; *Randolph v. City of Indianapolis* (1909), 172 Ind. 510; *City of Seymour v. Jordan* (1909), 173 Ind. 717; *City of Crawfordsville v. Brown* (1910), 45 Ind. App. 592.

When the amending act of 1909, *supra*, took effect, no proceeding was pending before the circuit court for the reassessment of benefits to appellant's lot.

4. Furthermore, this court has no jurisdiction of the subject-matter, and no appeal is authorized.

On the authority of the cases last cited, this appeal is dismissed.

DILLON, ADMINISTRATOR, v. THE STATE OF INDIANA.

[No. 7,995. Filed October 24, 1911.]

1. APPEAL.—*Briefs.—Failure to Set Out Motion for New Trial.*—Appellant's failure to set out, in his brief, his motion for a new trial, or the substance thereof, waives any question thereon. p. 496.
2. APPEAL.—*Briefs.—Setting out Evidence.*—A mere recital in appellant's brief of conclusions from the evidence presents no question thereon. p. 496.
3. APPEAL.—*Rules.—Courts.*—The Appellate Court rules are as binding as laws, and cannot be abrogated in a special case, at the discretion of the court. p. 496.

From Jefferson Circuit Court; *Hiram Francisco*, Judge.

Action by The State of Indiana against Michael Noon (Thomas B. Dillon, as the administrator of his estate, prosecutes the appeal). From a judgment for plaintiff, defendant appeals. *Affirmed.*

Perry E Bear and *Edwin C. Davis*, for appellant.

Thomas M. Honan, Attorney-General, *Edwin Corr*, *James E. McCullough* and *Thomas H. Branaman*, for the State.

ADAMS, J.—The style of this action, originally commenced before the mayor of the city of Madison, Indiana, was "The State of Indiana v. Michael Noon, *in rem* four barrels of whisky." The purpose of the action was to have the whisky seized by the officers and destroyed, pursuant to §8338 *et seq.* Burns 1908, Acts 1907 p. 27, §§2-14, governing the seizure of intoxicating liquors. Upon the filing of an affidavit, as required by law, a search-warrant was issued, and was served by taking into possession four barrels of whisky, the property of Michael Noon. Upon the hearing before the mayor, it was adjudged that said whisky was kept for the purpose of being sold in violation of the laws of the State, and the sheriff was ordered to destroy said whisky. Michael Noon appealed to the Jefferson Circuit Court, where the cause was submitted to the court without a jury. The find-

ing was for the State, and the judgment was that, within fifteen days thereafter, the whisky, together with the vessels that contained it, should be destroyed by the sheriff.

Appeal was taken to this court by appellant, and the only error argued and relied on for reversal is that the court erred in overruling the motion for a new trial.

It is first urged by appellee that no question is presented to this court, for the reason that neither the motion for a new trial, nor the substance thereof, is set out in appellant's brief, as required by the rules. The brief shows that Thomas Dillon, administrator, filed his motion for a new trial, which the court overruled, to which ruling appellant, at the time, excepted. Under the rule, as declared by numerous decisions of the Supreme Court and this court, the objection of appellee is well taken. *Pittinger v. Ramage* (1907), 40 Ind. App. 486; *Tongret v. Carlin* (1905), 165 Ind. 489; *Gregg v. Gregg* (1906), 37 Ind. App. 210.

But assuming that we are warranted in examining the argument to ascertain the grounds of the motion for a new trial, still counsel for appellee contend that no question is presented, as the rules require that where the insufficiency of the evidence to sustain the verdict or finding is assigned, the brief shall contain a condensed recital of the evidence in narrative form, so as to present the substance clearly and concisely. In the brief of appellant this rule is not observed. The recital of the evidence therein set out is simply a recital of the conclusions of counsel, liberally interspersed with argument, and does not disclose that any witness testified to the statements shown in the brief.

In the case of *Albaugh Bros., etc., Co. v. Lynas* (1911), 47 Ind. App. 30, this court said: "Appellees having in their brief directed attention to the failure of appellant to comply with the rule herein stated, it is not within the power of this court to ignore or arbitrar-

ily to refuse to consider the question thus raised. It is said in *Magnuson v. Billings* [1899], 152 Ind. 177, 180, that rules, when adopted and published, 'have the force and effect of law, and are obligatory upon the court, as well as upon parties to causes pending before it.' In the same case it is further said: 'A rule of court is a law of practice, extended alike to all litigants who come within its purview, and who, in conducting their causes, have the right to assume that it will be uniformly enforced by the court, in conservation of their rights, as well as to secure the prompt and orderly dispatch of business.''' To attempt to ascertain and decide questions not presented, as required, would be to abrogate the rules, which are as binding upon the court as they are upon litigants. *Schrader v. Meyer* (1911), *ante*, 36; *Reeves & Co. v. Gillette* (1911), 47 Ind. App. 221; *Bradley v. Harter* (1911), *post*, 541; *King v. State, ex rel.* (1911), 47 Ind. App. 595; *Chicago, etc., R. Co. v. Newkirk* (1911), *ante*, 349; *Buehner Chair Co. v. Feulner* (1905), 164 Ind. 368; *Indiana Union Traction Co. v. Heller* (1909), 44 Ind. App. 385.

The judgment is affirmed.

HALLAGAN v. JOHNSON.

[No. 8,088. Filed October 24, 1911.]

1. APPEAL.—*Perfecting*.—*Filing Transcript*.—The filing of a transcript is necessary to the perfection of an appeal. p. 498.
2. APPEAL.—*Parties*.—*Death*.—An appeal perfected in the name of a decedent is a nullity. p. 498.
3. APPEAL.—*Parties*.—*Death*.—Where a party dies before perfecting his appeal, his proper representative must take the appeal in his own name. p. 499.
4. APPEAL.—*Jurisdiction*.—*Parties*.—*Consent*.—Where an appeal is taken in the name of a decedent, the consent of the appellee to a substitution of decedent's representative as appellant cannot confer jurisdiction over the appeal; and such appeal will be stricken from the docket for want of jurisdiction. p. 499.

From Jasper Circuit Court; *Charles W. Hanley*, Judge.

Hallagan v. Johnson—48 Ind. App. 497.

Action by James W. Johnson against Patrick Hallagan. From a judgment for plaintiff, defendant appeals. *Appeal stricken from docket.*

Frank Foltz, for appellant.

George A. Williams, for appellee.

HOTTEL, J.—The attention of this court has been directed to a cause now pending herein, with the foregoing title and number, by a petition under oath filed in said cause, entitled a “petition and statement of facts showing the death of appellant, Patrick Hallagan, and asking that his executors be substituted as appellants in this cause,” to which petition is attached the certificate of the clerk of the Jasper Circuit Court, showing that letters testamentary, with the will annexed, of the estate of Patrick Hallagan were issued to the petitioners, James M. and Joseph Hallagan, and that they have duly qualified as such executors, and are authorized to take upon themselves the administration of said estate. Appellee’s attorney acknowledges service of a copy of the petition, and makes no resistance to the substitution. This petition shows that appellant, Patrick Hallagan, departed this life on July 2, 1911, and the transcript in this cause was not filed in this court until July 8, 1911. The

1. filing of the transcript is one of the steps necessary to perfect an appeal, and to give this court jurisdiction. *Michigan Mut. Life Ins. Co. v. Frankel* (1898), 151 Ind. 534; *Lake Erie, etc., R. Co. v. Watkins* (1902), 157 Ind. 600; Elliott, App. Proc. §§245-251, inclusive.

This appeal, under said showing made by the executors of decedent, was not perfected until after the death of appellant, and was therefore perfected in the name of

2. a dead man. Under such circumstances the appeal is “a fiction, a nullity.” *Moore v. Slack* (1894), 140 Ind. 38; *Doble v. Brown* (1898), 20 Ind. App. 12; *Hurst v. Hawkins* (1907), 39 Ind. App. 467; *Taylor v. Elliott* (1876), 52 Ind. 588; *Taylor v. Elliott* (1876), 53 Ind. 441.

Where the death of either party intervenes between
3. the time of the taking of the judgment and the perfecting of the appeal, the appeal must be taken under §677 Burns 1908, §636 R. S. 1881.

Appellee makes no resistance to the substitution prayed for in the petition, but as the appeal itself is a nullity,
4. this court has no jurisdiction of the case, and any steps taken by it, either with or without the consent of the appellee, would be a nullity.

The petition of the executors of appellant cannot, therefore, be entertained, and this cause is ordered stricken from the docket.

LANCASTER TOWNSHIP OF WELLS COUNTY v.
GRAVES ET AL.

[No. 7,141. Filed October 25, 1911.]

1. CHAMPERTY AND MAINTENANCE.—*Contracts.—Validity.*—At the common law contracts for maintenance or champerty were void. p. 501.
2. CONTRACTS.—*Payment of Costs of Litigation for Part of Amount Recovered.—Townships.*—A contract between a township and an auditing company, whereby the latter agreed to investigate the accounts of a former trustee of such township and, if necessary, to litigate his liability in court, its bond providing that it should “hold said * * * township free from all costs and expenses in any litigation,” its compensation being a certain per cent of the amount recovered, is void. p. 501.
3. CONTRACTS.—*Bonds.—Construction.—Townships.*—A contract by an auditing company, and the bond given to secure the performance thereof, executed to a township for the purpose of investigating the official acts of a former trustee and to recover any money found due to the township, must be construed together as constituting one contract. p. 503.

From Wells Circuit Court; *John M. Smith*, Special Judge.

Action by Lancaster Township of Wells County against John C. Graves, and others. From a judgment for defendants, plaintiff appeals. *Affirmed.*

Eichhorn & Vaughn, for appellant.

John C. Graves and *Frank W. Gordon*, for appellees.

MYERS, J.—In July, 1905, appellees John C. Graves, John H. Brubaker and John C. Dunlap, under the name of The J. C. Graves Auditing Company, were engaged in auditing the books and accounts of township trustees in Indiana. Said firm was employed to audit the books of a certain trustee of Lancaster township, Wells county, under a contract whereby said company was to receive for all services, costs and expenses connected with said investigation thirty-three and one-third per cent of all money recovered from said trustee, and in case it became necessary, to bring suit to recover any money found due to the township from said trustee, and as a part of said contract, said company agreed to protect the township and save it harmless from any costs and expenses incident to any litigation in connection therewith. For the faithful performance of said contract on its part, said company executed to appellant a bond in the sum of \$500, with appellee Federal Union Surety Company as surety. Pursuant to the terms of said contract, said company, in the name of said township, brought an action against said trustee, and on his bond, to recover certain money alleged to be due from him to Lancaster township. Thereafter such proceedings were had in the Wells Circuit Court that judgment was rendered in favor of defendants in that action, and against said township for costs, aggregating \$130.65, which was paid. Thereafter said township brought this action against appellees, and upon said bond, to recover the sum so paid by it on account of costs as aforesaid.

A demurrer for want of facts was sustained to the complaint, and, appellant refusing to plead further, judgment was rendered against it. The following questions are presented for our consideration: (1) Was the contract between said company and appellant champertous? (2) Is the

surety on a bond liable for the faithful performance of a champertous contract?

At common law, contracts for maintenance and champerty were void (*Scobey v. Ross* [1859], 13 Ind. 117; *Coquillard's Admr. v. Bearss* [1863], 21 Ind. 479, 83 Am. Dec.

1. 362), and in this State the common law, with some restrictions with reference to such contracts, is recognized and enforced (*Mud Valley, etc., Gas Co. v. Hitchcock* [1907], 40 Ind. App. 105). The reason that such contracts are void is well known (*Scobey v. Ross, supra*; *Brown v. Bigne* [1891], 21 Or. 260, 28 Pac. 11, 14 L. R. A. 745, 28 Am. St. 752; *Mud Valley, etc., Gas Co. v. Hitchcock, supra*), and we need not enter into an investigation of that subject.

The breach of the bond on which this action is

2. predicated is the refusal of appellees to reimburse appellant for court costs paid according to the following terms of the bond:

“If the above-bound The J. C. Graves Auditing Company shall hold said Lancaster township free from all court costs and expenses in any litigation growing out of any suit or suits which may be filed against Joel Frye, ex-trustee of said township, under a certain contract this day executed between the advisory board of said township and The J. C. Graves Auditing Company, then the above obligation to be void, else to remain in full force.”

The parties to the contract, in anticipation of litigation with the former trustee, in consideration of thirty-three and one-third per cent of the amount recovered, stipulated that all attorneys' fees, costs and expenses which might be incurred in any suit or suits for the recovery of any moneys found due the appellant, should be paid by the auditing company. The essence of the contract on the part of appellant was that in case of litigation and no recovery there was to be no liability; and, further to protect it in this respect, the bond in suit was executed. The two instruments are not unimportant, as evincing appellant's intention not

to risk the expense of such litigation on the evidence furnished by the parties it was about to employ. But taking the contract as a whole, it amounted to no more nor less than that appellant employed The J. C. Graves Auditing Company to secure evidence of money due to the township from its ex-trustee, said firm, at its own expense, to carry on any necessary litigation for a share of the amount recovered. Nothing appears in the complaint to show that the auditing company, at the time the contract was executed, had any interest, either direct or remote, present or contingent, or even as a taxpayer, in the subject-matter of the proposed litigation. Such a contract on its face has all the elements of champerty, which is said to be "a species of maintenance, 'being a bargain with the plaintiff or defendant to divide land or other matter sued for between them if they prevail at law, whereupon the champertor is to carry the party suit at his own expense.' " 2 Words and Phrases 1047. It is "the unlawful maintenance of a suit in consideration of some bargain to have a part of the thing in dispute, or some profit out of it." Anderson's Law Dict.

The vice in such contracts, and that which the law, under modern construction, condemns, is in permitting an entire stranger to stir up strife and litigation by bringing an action or making a defense, which the party in interest would not do if left to his own judgment, and uninduced by the fact that the litigation will be carried on, or the defense made, at the expense of another, for what he may acquire from the party maintained. Under the doctrine of the common law, as enforced in this State, with reference to champertous contracts, the agreement between appellant and said company was void. *Quigley v. Thompson* (1876), 53 Ind. 317; *Hart v. State, ex rel.* (1889), 120 Ind. 83; *Mud Valley, etc., Gas Co. v. Hitchcock, supra*; *Lancy v. Havender* (1888), 146 Mass. 615, 16 N. E. 464; *Belding v. Smythe* (1885), 138 Mass. 530; *City of Carbondale v. Brush* (1907), 133 Ill. App. 236; *Kelly v. Kelly* (1893), 86 Wis. 170, 56 N. W. 637;

J. I. Case, etc., Mach. Co. v. Souders—48 Ind. App. 503.

Roller v. Murray (1907), 107 Va. 527, 59 S. E. 421; *Moreland v. Devenney* (1905), 72 Kan. 471, 83 Pac. 1097.

The contract and bond were executed on the same day, the latter to indemnify against loss in case of a default of a certain void stipulation in the former. In this case

3. they must be treated as inseparably connected, for the reason that liability on the bond and appellant's right to sue are dependent upon the contract; for without a contract there could be no default, and without a default there could be no breach of the bond, which is the gist of this action. Therefore, the ruling of the court was correct.

In considering this case we have not been unmindful of the restriction of the common law that permits attorneys to contract with their clients for professional fees, contingent on the result of the litigation (*Whinery v. Brown* [1905], 36 Ind. App. 276); but we have been unable to find any case upholding an agreement between an attorney and client, whereby the former is to bear all the costs and expenses of the litigation for a share of the recovery.

Judgment affirmed.

J. I. CASE THRESHING MACHINE COMPANY v. SOUDERS.

[No. 7,312. Filed October 26, 1911.]

1. CONTRACTS.—*Liquidated Damages*.—A contract that fixes a certain sum as liquidated damages for its breach is valid, where such amount is reasonably proportionate to the actual damage sustained. p. 505.
2. CONTRACTS.—*Liquidated Damages*.—*Penalties*.—*Directing Verdict*.—A provision in a contract for the sale of a threshing outfit that "in consideration of the expense incurred by the company in soliciting, investigating and taking this order, the purchaser promises and agrees to pay * * * fifteen per cent of the price * * * in case he should cancel the order or decline to accept the machinery," constitutes a penalty, and is

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invalid, where the expenses incurred consisted merely in taking defendant's order and in mailing some letters asking as to defendant's responsibility, the expenses being confined solely to those mentioned in the contract; and, in an action for such per cent, a verdict was properly directed for defendant. p. 507.

From Superior Court of Tippecanoe County; *Henry H. Vinton*, Judge.

Action by the J. I. Case Threshing Machine Company against Frank T. Souders. From a judgment for defendant, plaintiff appeals. *Affirmed*.

Edwin P. Hammond, William V. Stuart and Dan W. Simms, for appellant.

Edgar G. Collins, for appellee.

ADAMS, J.—Appellee, who was defendant below, purchased a threshing outfit from appellant, the terms being evidenced by a written contract. The only part of the contract involved in this appeal is the following stipulation:

“In consideration of the expense incurred by the company in soliciting, investigating and taking this order, the purchaser promises and agrees to pay all freight charges on said machinery from the factory, and fifteen per cent of the price above stipulated in cash, in case he cancels this order or declines to accept said machinery.”

The purchase price of the machinery was \$2,475. Appellant shipped and offered to deliver the machinery to appellee, who declined to receive it, and this action was brought to recover the sum of \$371.25, being fifteen per cent of the purchase price, and the further sum of \$21.60, the amount of freight paid upon the shipment. All proof of freight charges paid by appellant was withdrawn from the jury at the close of the evidence. The court then gave to the jury a peremptory instruction, directing a verdict for appellee, and entered judgment on the verdict that appellant take nothing by its action, and that appellee recover his costs. Appellant filed its motion for a new trial, the over-

ruling of which motion constitutes the only error assigned and relied on for reversal.

The only question presented to this court and argued by counsel, is whether the agreement heretofore set out constitutes a claim for liquidated damages, or whether it provides for the payment of fifteen per cent of the purchase price as a penalty. Appellant contends that if the stipulated damages are to be held as liquidated damages, and not as a penalty, then the court invaded the province of the jury in giving the peremptory instruction. Appellee admits that this is strictly true, but says that the construction to be given the stipulation for damages is one of law for the determination of the court, and as the court properly interpreted the law, no error resulted from giving the peremptory instruction.

Whether the amount stipulated in a contract to be paid by a party upon failure of performance is to be treated as liquidated damages, or as a penalty, has been a fruit-

1. ful source of litigation, and the subject of much judicial interpretation. Certain general rules are recognized as controlling, but when applied to particular cases, the question becomes one of great difficulty, and the authorities are not in full accord. The general rule governing the subject is laid down in 1 Sedgwick, Damages (8th ed.) §405, as follows: "Whenever the damages were evidently the subject of calculation and adjustment between the parties, and a certain sum was agreed upon and intended as compensation, and is in fact reasonable in amount, it will be allowed by the court as liquidated damages. This rule will be found to be applicable to all contracts, and really involves the consideration of the subject in the three following aspects—that of the intent of the parties; that of the reasonableness of the contract, and that of the weight allowed by the court to the language employed." The same authority (1 Sedgwick, Damages [8th ed.] §406), on the question of intention of the parties, says: "Courts will not

go outside the contract to ascertain the intention of the parties in entering into it. To do this would often be to violate the elementary maxim that parol evidence cannot be introduced to vary or control a written instrument, and, accordingly, it is well settled that the character of the agreement is a matter of law to be decided by the court upon a consideration of the whole instrument.”

In 1 Sutherland, Damages (3d ed.) p. 721, it is said: “The trend of judicial thought and action on the subject is well and frankly expressed by Justice Marshall of the Wisconsin court: ‘The law is too well settled to permit any reasonable controversy in regard to it at this time, that where parties stipulate in their contract for damages in the event of a breach of it, using appropriate language to indicate that the damages are agreed upon in advance, and such damages are unreasonable considered as liquidated damages, the stipulated amount will be considered to be a mere forfeiture or penalty and the recoverable damages be limited to those actually sustained. While courts adhere to the doctrine that the intention of parties must govern in regard to whether damages mentioned in their contract are liquidated, they uniformly take such liberties in regard to the matter, based on arbitrary rules of construction, so called, as may be necessary to effect judicial notions of equity between parties, guided of course by precedents that are considered to have the force of law, sometimes calling that a penalty which the parties called stipulated damages, where otherwise an unconscionable advantage would be obtained by one person over another.’ ” See, also, *Seeman v. Biemann* (1900), 108 Wis. 365, 84 N. W. 490.

In this State, many cases are reported on the subject of liquidated damages. In the case of *Jaqua v. Heddington* (1888), 114 Ind. 309, it is announced as a general rule, that “where the sum named is declared to be fixed as liquidated damages, is not greatly disproportionate to the loss that may result from a breach, and the damages are not measure-

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able by any exact pecuniary standard, the sum designated will be deemed to be stipulated damages.” In the case of *Mondamin, etc., Dairy Co. v. Brudi* (1904), 163 Ind. 642, it is said: “The rule generally affirmed by the authorities is that where it is agreed by the parties that the sum or rate fixed in a contract shall be liquidated damages, and the case is one in which they are at liberty so to agree, such an agreement must stand and control, unless it is inconsistent with other parts of the contract, or is unreasonable or unconscionable, in view of the probable damages which may flow from a breach of such a contract.” See, also, *Merica v. Burget* (1905), 36 Ind. App. 453; *Chicago, etc, R. Co. v. McEwen* (1905), 35 Ind. App. 251; *Bird v. St. John’s Episcopal Church* (1900), 154 Ind. 138. The authorities are so numerous, and the decisions predicated on such a variety of facts, that it would unduly extend this opinion to give citations from other states. Many cases are collected in 13 Cyc. 89, and also in the notes to the case of *Condon v. Kemper* (1891), 13 L. R. A. 671.

It is insisted by appellant that the damages incident to the breach of this contract are not limited to the elements named, but include all consequential damages growing out of the failure to accept the machinery, and must have been contemplated by the parties at the time the contract was executed. This cannot now be considered an open question. In the case of *J. I. Case Threshing Mach. Co. v. Fronk* (1908), 105 Minn. 39, 117 N. W. 229, a contract, identical with this one, was construed by the supreme court of Minnesota, and held to be limited by the language of the contract to “expenses incurred in soliciting, investigating and taking this order.” The expenses being out of proportion to the actual damage suffered by plaintiff, the amount provided for was held to be a penalty. The court said: “Applying the rule to the case at bar, we have no difficulty in reaching the conclusion that the amount stipulated by the terms of this contract is flagrantly out of

proportion to the actual damages suffered by plaintiff in the respects for which compensation was intended, as indicated by the language of the contract, viz., for the expense incurred 'in soliciting, investigating and taking this order,' and should therefore be held a penalty. The parties by their language clearly show an intention to provide compensation to plaintiff for the expense incurred by it in procuring and accepting the order; and in the light of the evidence offered on the trial it is beyond question that the sum of \$450, being fifteen per cent of the purchase price of the machine, greatly exceeds any possible expense the company might have incurred in that respect. We have no right to go beyond the contract, and speculate upon the question whether the company might not have incurred expenses in other respects. The contract furnishes the data for what compensation was intended to be made, and the parties are necessarily limited to their written agreement. We do not, therefore, consider the many matters which counsel for plaintiff suggest the company might have taken into consideration in exacting this stipulation. Confining the question to the terms of the contract, and considering the stipulated damages to have reference, as the contract speaks, to expenses incurred in 'soliciting, investigating, and taking' the order, the question is free from serious doubt." At the hearing of the case at bar, it was shown that the appellee went to LaFayette, sought an interview with appellant's agent, and gave the order, which was sent at once to the state manager at Indianapolis. Inquiries concerning the financial condition of appellee were addressed to banks and business men at LaFayette and Battle Ground, to which favorable replies were received. The order was then accepted, and forwarded to the home office at Racine, Wisconsin. This was the extent of the work shown to have been done in soliciting, investigating and taking the order.

Upon the trial, appellant directed all its proof to showing full performance of the contract by it, and a breach

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thereof by appellee. No proof of actual damage was offered, for the evident reason that if the damages were stipulated in advance by the parties, as contended by appellant, the amount so agreed upon constituted a positive debt for a fixed amount, and excluded evidence of actual damages. It was, therefore, the duty of the trial court, if satisfied that the contract was for liquidated damages, to submit to the jury only the controverted question of the breach; but, if satisfied that the damages provided for in the contract constituted a penalty, it was the duty of the court to instruct the jury to find for appellee. Since the question of freight charges was taken out of the case, there was no error in giving to the jury the peremptory instruction.

The judgment is affirmed.

FARNHAM v. SCHNEIDER.

[No. 7,630. Filed October 26, 1911.]

1. **MUNICIPAL CORPORATIONS.—Street Improvements.—Assessments.**
—*Appeal.*—Under §8714 Burns 1908, Acts 1905 p. 219, §109, providing that “the question of special benefits shall be deemed conclusively determined by and in the proceedings before the board of public works,” and §8716 Burns 1908, Acts 1905 p. 219, §111, providing that if the owner of any lot shall petition the circuit court within ten days from the completion of the assessment roll, the court shall appoint three appraisers whose report “shall be final and conclusive,” no appeal lies from the assessment so made, and a defendant in a foreclosure suit cannot, therefore, contest the amount of his assessment. pp. 510, 511.
2. **APPEAL.—Right of.**—The right of appeal is statutory. p. 511.

From Wayne Circuit Court; *Henry C. Fox*, Judge.

Suit by J. W. George Schneider, as executor of the last will of John H. A. Schneider, deceased, against Charles S. Farnham. From a decree for plaintiff, defendant appeals. *Affirmed.*

Wilfred Jessup, for appellant.

Henry U. Johnson, for appellee.

IBACH, J.—Statutory action in the Wayne Circuit Court, by appellee against appellant, under §109 of an act concerning municipal corporations (Acts 1905 p. 219, §8714 Burns 1908), to foreclose a street contractor's assessment liens arising from the improvement of South First street in the city of Richmond, pursuant to a resolution of the board of public works of said city. Said improvements were made under §§8710-8721 Burns 1908, Acts 1905 p. 219, §§107-109, 111-114, Acts 1907 p. 167, and p. 550, §§1-3. Appellant in his answer sought to contest his assessments, by showing that they were excessive, and that his lots were not benefited, by said improvement, to the amounts assessed. The court sustained demurrers to the separate paragraphs of answer. Appellant excepted and declined to plead further, and judgment was rendered for appellee. The ruling on the demurrers to the paragraphs of answer is assigned as error.

Section 8714, *supra*, provides that "in such foreclosure suits no defense shall be allowed upon any irregularity in the proceedings making, ordering or directing such
1. assessment, nor shall any question as to the propriety or expediency of any improvement or work be therein made;" that, however, a property owner who has not signed a waiver, or claimed the option to pay in instalments, may contest the amount of his assessment, "provided, that the question of special benefits shall be deemed conclusively determined by and in the proceedings before the board of public works as in this act elsewhere prescribed." Section 111 of said act (§8716 Burns 1908) declares that "the decision of such board as to all such benefits shall be final and conclusive," unless the property owner, in a prescribed manner and at a prescribed time, petitions the court to appoint appraisers to reassess his damages on the ground that his assessment is excessive, and the report of such appraisers is made final and conclusive on all parties thereto. The only relief from the decision of the board of public works as

to the amount of the assessment, which is afforded by the statute, is the reassessment by appraisers, and the Supreme Court and this court have several times held that no appeal lies from the action of these appraisers. The right of

2. appeal is statutory, and does not exist in special proceedings, unless expressly given. Since the action of these appraisers is made final and conclusive by statute, there is no appeal from their assessment. Appellant has not, as he might have done under the statute at the

1. proper time, petitioned the court to appoint appraisers. This is the only legal manner in which the decision of the board of public works may be questioned, otherwise its decision is final and conclusive; and appellant, having failed to follow his proper remedy, is bound by the action of said board, and cannot have a review by this court. *Randolph v. City of Indianapolis* (1909), 172 Ind. 510, and cases cited; *City of Indianapolis v. State, ex rel.* (1909), 172 Ind. 472; *City of Seymour v. Jordan* (1909), 173 Ind. 717; *City of Crawfordsville v. Brown* (1910), 45 Ind. App. 592; *City of Huntington v. Brown* (1911), 175 Ind. 709.

The trial court committed no error in its ruling on appellee's demurrers to the separate paragraphs of appellant's answer. The judgment is affirmed.

WALLACE v. COONS.

[No. 7,250. Filed May 23, 1911. Rehearing denied October 26, 1911.]

1. APPEAL. — *Precipe.* — *Certificate.* — *Bills of Exceptions.* — "*Evidence.*"—Where appellant's *precipe* directed the clerk to "prepare and certify a full, true and complete transcript of all the papers, orders, evidence and proceedings, filed and had in" the cause, and the clerk certified that the transcript contained "full, true and correct copies of all papers * * * and * * * the original bill of exceptions, containing the evidence * * * as required by said *precipe*, and as directed by the plaintiff herein,"

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the bill of exceptions is a part of the record, the direction to include the "evidence" being equivalent to a direction to include the bill of exceptions, which alone contained the evidence, the clerk's certificate curing the defect, if any exists. pp. 514, 515.

2. **APPEAL.—*Transcript.—Copies.***—With the exception of the bill of exceptions (see §§657, 667 Burns 1908, Acts 1897 p. 244, Acts 1903 p. 338, §7), the transcript on appeal may contain only copies of the papers and entries below; and if the originals thereof be certified they cannot be considered. p. 515.
3. **CONTRACTS.—*Sales of Animals.—Breach.—Market Price.—Complaint.***—A complaint for the breach of a contract for the purchase of hogs, alleging that the plaintiff, upon defendant's refusal to accept the hogs, shipped them to the Union Stockyards at Indianapolis and sold them at a certain price, being the best price he could obtain, sufficiently shows that he sold them at the market price. *Ridgley v. Mooney*, 16 Ind. App. 362, distinguished. p. 516.
4. **PLEADING.—*Evidence.—Judicial Notice.***—A complaint alleging that animals were sold at a stockyard sufficiently shows that they were sold at the market price, since courts judicially know that the sale of animals at such places determines the market price. p. 517.
5. **CONTRACTS. — *Sales. — Breach. — Notice.*** — In an action for the breach of an executory contract to purchase hogs, it is not necessary for the plaintiff, after the vendee's refusal to accept the hogs, to prove that he gave such vendee notice of the sale of the hogs, since the title remained in the vendor, and the action was merely for the breach of contract. p. 517.
6. **CONTRACTS.—*Sales.—Breach.—Special Findings.***—In an action for the breach of an executory contract to purchase a certain number of hogs, special findings that defendant refused to accept the hogs, that the plaintiff sold them and that his loss thereon in consequence of such refusal was a certain sum, requires a judgment for the plaintiff in such amount. p. 518.

From Johnson Circuit Court, *William E. Deupree*, Judge.

Action by Elijah S. Wallace against William H. Coons.
From a judgment for defendant, plaintiff appeals. *Reversed.*

William Featherngill, for appellant.

Elba L. Branigin and *Thomas Williams*, for appellee.

IBACH, J.—Action by Elijah S. Wallace, against William H. Coons, for damages on account of the breach of a written contract for the sale of a carload of hogs. The complaint was in two paragraphs. In brief, the averments of the first

are as follows: That on July 6, 1906, appellant and appellee entered into a written contract, whereby Wallace agreed, at any time during the last half of August, 1906, upon two days' notice, to deliver to Coons at Indianapolis, Indiana, a double-deck carload of hogs, each hog weighing two hundred pounds, or more, the total net weight of the carload to be 32,000 pounds, to be weighed at Indianapolis, which Coons agreed to purchase from Wallace, and to pay him for the hogs \$7 a hundred pounds; that after July 6, 1906, Wallace, at great labor and expense, purchased the number and kind of hogs described in said contract, and kept them in Putnam and Hendricks counties, Indiana, ready to be delivered to Coons at any time during the last half of August, 1906, on notice from Coons; that Coons failed to designate any time when he would receive said hogs; that on August 31, 1906, Coons having failed to designate any time when he would accept said hogs, Wallace shipped them to the Union Stockyards at Indianapolis, Indiana, and sold them to other persons for \$6.37½ a hundred pounds, that being the best price he could obtain; that Wallace fully performed all his part of the obligations of said contract, and by reason of Coons's failure to accept the hogs during said time at the agreed price, Wallace sold them to other persons at a great loss, and was damaged in the sum of \$200, which amount Coons has not paid.

The second paragraph sets forth practically the same preliminary facts, and avers that Wallace agreed to sell the hogs to Coons; that he kept the hogs ready to be weighed at Indianapolis and sold to Coons, and that he sold the hogs to other parties at a loss of \$200.

A demurrer to each paragraph of the complaint was overruled, and an answer in general denial was filed. The cause was tried without a jury. The court made and filed a special finding of facts and stated its conclusions of law thereon, to the effect that plaintiff take nothing in his action,

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and that defendant recover costs. Plaintiff's motions to amend the special findings, for leave to amend his complaint, and for a new trial, were overruled, and judgment was rendered against him for costs.

Appellant insists that his motion for a new trial should have been sustained, for the reasons that the decision of the court is not sustained by sufficient evidence and is contrary to law.

Appellee contends that the bill of exceptions is not in the record, and therefore no question raised by the motion for a new trial can be considered.

The precipe for the transcript filed by appellant, omitting the title of the cause, is as follows: "The clerk of the Johnson Circuit Court will prepare and certify a full, true and complete transcript of all the papers, orders, evidence and proceedings, filed and had in the above-entitled cause, to be used on appeal to the Appellate Court of Indiana, as follows, to wit: * * * (5) The evidence given in said cause." The certificate of the clerk, as amended, the amendment having been authorized by this court on October 26, 1909, is as follows: "I, Joseph A. Schmith, clerk of the Johnson Circuit Court, within and for said county and State, do hereby certify that the above and foregoing transcript contains full, true and correct copies of all papers and entries in said cause required by the above and foregoing precipe, and that said transcript contains the original bill of exceptions, containing the evidence introduced in said cause, as required by said precipe, and as directed by the plaintiff herein named." He also certifies to the filing on May 23, 1908, by the stenographer, of the longhand transcript of the evidence, that is incorporated in the bill of exceptions and made a part of the transcript, and that the regular judge of the court signed the bill, and ordered it made a part of the record, that it was filed in the clerk's office, and is the bill of exceptions contained in the transcript. Appellee earnestly insists that the bill of exceptions

is not in the record, because no bill of exceptions is mentioned in the precipe, and that the clerk is directed only to certify a transcript of the evidence given in said cause.

It is well understood that under our code of civil procedure all papers, entries and documents must be copied into the transcript on appeal to the Supreme Court

2. and Appellate Court, and that no original paper can be incorporated in such transcript; and if any such original paper, entry or document is so made a part of the transcript, it will not be considered. §691 Burns 1908, §650 R. S. 1881; *Mankin v. Pennsylvania Co.* (1903), 160 Ind. 447. The only exception to this rule is that made by §§657, 667 Burns 1908, Acts 1897 p. 244, Acts 1903 p. 338, §7, in which it is provided that the original bill of exceptions containing the evidence need not be copied into the transcript, but the original may be included in it, and thereby become a part of it, and this court is required to give it due consideration.

It will be observed that the precipe in this case notified the clerk to prepare a full, true and complete transcript of all the papers, orders, evidence and proceedings in 1. the case, and specifically to include in the transcript "the evidence given in said cause," and the clerk certified that the "transcript contains the original bill of exceptions, containing the evidence introduced in said cause, as required by the precipe and as directed by the plaintiff." The precipe does not in specific terms direct the clerk to make a copy of the bill of exceptions, but it does direct him to include in the transcript the evidence given in the cause. The certificate is in the form provided for by §7 of the act of 1903 (Acts 1903 p. 338, §667 Burns 1908), and complies in all respects with the law prescribing what the clerk's certificate in such instances should contain, and when this appears, any irregularities in the precipe will be cured by the certificate of the clerk. The original bill of exceptions containing the evidence is included in the transcript, as

fully appears from the clerk's certificate, and since the precept directs the clerk to certify a full, true and complete transcript of the evidence given in the case, and in compliance therewith the original bill of exceptions is incorporated in the transcript, we conclude that the bill of exceptions is properly before us, and that we are authorized to consider the motion for a new trial.

It is assigned as one reason for a new trial that the decision of the court is contrary to law. To determine this question, we must look first to the sufficiency of the

3. complaint. Appellee urges that the first paragraph is bad, for failure to allege that the hogs were sold at the market price, and to sustain his contention he relies largely on the case of *Ridgley v. Mooney* (1896), 16 Ind. App. 362, a suit for damages for breach of a contract to purchase a quantity of chestnut bark. The complaint in that case did not allege specifically the time or place of sale of the bark, but that the plaintiff "sold it within a reasonable time and exercised due diligence, and by good faith tried to realize the best price he could for the bark, and did realize the best attainable price therefor at said time." It was correctly held insufficient, because it contained no allegation that the price obtained for the bark was the market value at the time and place of delivery under the contract.

The complaint which we are considering can be readily distinguished from the complaint in the case of *Ridgley v. Mooney, supra*. Though it does not allege in terms that the hogs were sold at the market price at the time and place of delivery, it does allege that on August 31, 1906, Wallace shipped the hogs to the Union Stockyards at Indianapolis, Indiana, and sold them at \$6.37½ a hundred pounds, that being the best price he could obtain. This averment is equivalent to an averment in terms that the hogs were sold for the highest market price at the time and place of delivery mentioned in the contract, for it states facts showing that Wallace sold the hogs at the time (August, 1906) and

place (Indianapolis, Indiana), in the Union Stockyards for the best price there obtainable. It is a matter of

4. common knowledge that a stockyard is a market for hogs and cattle, and the best price there obtainable must be the best market price, for sales there made determine the market price. "Courts of necessity take notice of the ordinary course of business and the common methods by which it is transacted." 7 Ency. Ev. 935. They note "whatever ought to be generally known within the limits of their jurisdiction." *Simpson v. Pittsburg, etc., Glass Co.* (1902), 28 Ind. App. 343. See, also, 1 Hogate, Pl. and Pr. §353. We eliminate further consideration of the second paragraph of the complaint, as it is clearly insufficient.

The court found specially, among other things, that on August 30, 1906, Wallace shipped the hogs, purchased for Coons, to Mansfield & Co., live-stock commission merchants at Indianapolis, Indiana, and that the hogs were sold by Mansfield & Co., at the Union Stockyards at Indianapolis, on August 31, 1906, to persons other than Coons, for \$6.37½ a hundred pounds, that being the best price that could be obtained for them, and this finding was abundantly supported by the evidence. The special findings substantiate in every particular the allegations of the first paragraph of the complaint. The court also made certain findings—as to which there was no evidence—to the effect that appellant gave appellee no notice before selling the hogs. Such

5. notice was immaterial. Had the title to the hogs passed by the contract to appellee, and had he refused to receive them, appellant could not have sold them again without giving notice to appellee, if he expected to hold him for the difference in price. But such is not the theory of the paragraph of complaint upon which, from the evidence, it appears the case was tried. From the allegations in the first paragraph it is evident that the theory is to recover damages for the difference between the price fixed in the contract—\$7 a hundred pounds—and the

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amount obtained at the stockyards at Indianapolis at the market price at the time of sale—\$6.37½ a hundred pounds—which difference on 32,000 pounds, the weight of the car-load specified in the contract, amounted to \$200. The contract between Wallace and Coons was an executory contract of sale, and appellant, before selling the hogs to others, had no need to notify appellee, who had committed a breach of his executory contract, by failing to receive the hogs. *Dill v. Mumford* (1898), 19 Ind. App. 609; *Ridgley v. Mooney*, *supra*.

We do not commend the complaint as a model of clear and exact pleading, but we hold the first paragraph sufficient;

and as it is sustained by the evidence and by the spe-

6. cial findings of the court, and since the court erred in stating its conclusions of law, the case is reversed, and remanded to the trial court, with instructions to restate the conclusions of law in accordance with this opinion, and render judgment in favor of appellant, and against appellee in the sum of \$200 and costs.

MESKER v. FITZPATRICK.

[No. 7,199. Filed April 28, 1911. Rehearing denied June 22, 1911.

Transfer denied October 27, 1911.]

APPEAL. — *Transcript.* — *Complaints.* — *Identification.* — *Change of Venue.* — *Presumptions.* — Where two amended complaints were filed, to one of which a demurrer was sustained, and a change of venue was taken, and the transcript on appeal shows only that the amended complaints were copied without distinction as to date of filing, the Appellate Court is unable to determine on which complaint the trial was had, there being no presumption by which their identity could be determined, and, therefore, no question is presented.

From Warrick Circuit Court; *Roscoe Kiper*, Judge.

Action by John E. Fitzpatrick against George L. Mesker. From a judgment for plaintiff, defendant appeals. *Affirmed.*

Elmer E. Stevenson and Iglehart, Taylor & Heilman, for appellant.

George K. Denton, Thomas W. Lindsey and Robinson & Stillwell, for appellee.

LAIRY, P. J.—This action was commenced by appellee in the Superior Court of Vanderburgh County. A change of venue was taken to the Warrick Circuit Court, and a transcript of the proceedings in said superior court was filed with the clerk of the Warrick Circuit Court on July 15, 1908, which transcript is the first paper copied into the transcript before us. The transcript on change of venue shows that two amended complaints were filed in the Superior Court of Vanderburgh County, to one of which a demurrer had been sustained, and to the other of which a demurrer was pending at the time of the change. These amended complaints were not copied into the transcript on change of venue, but were filed with the transcript in the office of the clerk of the Warrick Circuit Court, as was also the original complaint. Upon the filing of the transcript in the Warrick Circuit Court, the clerk made entries, showing the filing of the transcript, the original complaint, and the two amended complaints. In preparing the transcript for appeal, the clerk of the Warrick Circuit Court copied the original complaint into the transcript, following the entry made by him on July 15, 1908, showing its filing in his office, and also copied the two amended complaints, one following each of the entries made on said date showing their filing in his office. There is nothing in either entry in reference to the filing of the amended complaints, indicating the date on which either was filed in the Superior Court of Vanderburgh County, and nothing to show which amended complaint was filed on May 18, 1908. The subsequent proceedings show that the issues were formed and the trial had on the amended complaint filed on May 18, 1908, but there is no way of identifying this amended complaint.

The point is urged by appellee that this court has no means of identifying the complaint upon which the trial was had and the judgment rendered, and that therefore no question is presented for decision, because of this imperfection of the record. We are asked by appellant to indulge the presumption that the clerk of the Warrick Circuit Court copied these complaints into the transcript, in the same order in which they were filed in said superior court. The clerk does not certify that he copied the complaints into the transcript in this order, and, in the absence of an affirmative showing, no presumption of this kind can arise. It is settled by the decisions of the Supreme Court of this State, that when two amended complaints are copied into the record, and where it is impossible to determine from the record upon which of said amended complaints the trial was had, no question is presented for decision. It is also held that such an imperfection of the record is not cured by any presumption arising from the presence in the record of the unidentified complaint. *Marsh v. Bower* (1898), 151 Ind. 356; *Geisen v. Reder* (1898), 151 Ind. 529.

In the case of *Marsh v. Bower, supra*, the Supreme Court says: "There is abundant authority for the proposition that upon the appellant rests the duty of presenting a record disclosing manifest error. Elliott, App. Proc. §186. It is well settled, also, that, in the absence of the complaint, no question is presented for decision. *Collins v. United States Express Co.* [1866], 27 Ind. 11; *McCardle v. McGinley* [1882], 86 Ind. 538, 44 Am. Rep. 343; *Fellenzer v. Van Valzah* [1884], 95 Ind. 128; *Reid v. Reid* [1898], 149 Ind. 274; *Evansville, etc., R. Co. v. Lavender* [1893], 7 Ind. App. 655; *Geisen v. Reder* [1898], 151 Ind. 529. In the last case cited, upon a record much like the present, the court held that such an imperfection could not be cured by any presumption arising from the presence, in the transcript, of the pleading unidentified as that upon which the trial was had. The sufficiency of pleadings, the correctness of conclusions

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of law, and questions upon the motion for a new trial all relate back to the complaint, and, in its absence from the record are not properly presented.”

On the authority of the cases cited, we are constrained to hold that the record in this case presents no question for our decision. The judgment is therefore affirmed.

MOORELAND RURAL TELEPHONE COMPANY v. MOUCH.

[No. 6,964. Filed October 27, 1911.]

1. TELEGRAPHS AND TELEPHONES.—*Common Carriers*.—Telephone companies are common carriers of news; and the property used in such business is impressed with a public use. p. 524.
2. TELEGRAPHS AND TELEPHONES.—*Discrimination*.—Telephone companies must serve the public without discrimination. p. 524.
3. TELEGRAPHS AND TELEPHONES.—*Legislative Control Over*.—The legislature has control over telephone companies. p. 524.
4. TELEGRAPHS AND TELEPHONES.—*Discrimination*.—*Complaint*.—A complaint alleging that defendant telephone company charged \$1 a month for residence telephones and \$1.25 a month for “business telephones,” that the plaintiff had a residence telephone and that the defendant demanded the payment of \$1.25 a month therefor and that no one else was charged such price for a residence telephone, sufficiently shows a discrimination, and entitles the plaintiff to injunctive relief. p. 525.
5. TELEGRAPHS AND TELEPHONES.—*Discrimination*.—*Answer*.—In a suit to enjoin a telephone company from refusing to serve the plaintiff, the complaint alleging that the company wrongfully demanded a “business” rate for his residence telephone, an answer that the plaintiff, without right, was using his residence telephone for business purposes, is insufficient, since it fails to show that others, similarly situated, were not doing likewise. p. 527.

From Henry Circuit Court; *Ed Jackson*, Judge.

Suit by Joseph Mouch against the Mooreland Rural Telephone Company. From a decree for plaintiff, defendant appeals. *Affirmed*.

Forkner & Forkner, for appellant.

Eugene H. Bundy and *N. Guy Jones*, for appellee.

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MYERS, J.—This was a suit by appellee against appellant, to enjoin the latter from removing a telephone from the former's residence. A demurrer for want of facts was sustained to appellant's amended answer, and on its refusal to plead further, a decree was entered for appellee.

The errors assigned call in question the sufficiency of the complaint for want of facts, by an independent assignment, and also by an assignment based on the failure of the court to carry the demurrer to the answer back to the complaint, and the ruling of the court on the demurrer for want of facts to the amended answer.

It appears that appellant is a corporation engaged in the general telephone business, with its home office and principal place of business at the town of Mooreland. Appellee is a resident of said town, and is there conducting and operating a grain elevator, and doing a general grain business. Aside from his elevator, in which he has an office, he maintains a dwelling-house, in which the telephone in question is located. Since the organization of said telephone company appellee has been a stockholder, and, under its rules, is entitled to two telephones. Prior to September, 1907, he had one telephone in his residence and one in his office, paying for each \$1 a month, the uniform charge under the rules of the company. The answer avers that on August 17, 1907, the stockholders at a general meeting adopted the following resolution: "That all business men, including doctors, stock-dealers that ship on an average of one car each month, blacksmiths, contractors, real estate agents, etc., be charged twenty-five cents more each month for each business telephone, commencing September 1, 1907." This resolution was in force at the time this suit was commenced. On September 6, 1907, the board of directors of said company, at a special meeting, ordered the removal of all telephones classed as business telephones, unless the patrons having such telephones would pay the increased rate. Appellee refused to pay the extra charge for the use of the telephone in his office,

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and it was thereupon removed. Thereafter said board classed the telephone in appellee's residence as a business telephone, on the theory, as averred in appellant's amended answer, that appellee, after the removal of the telephone from his office, maintained no other telephone for business purposes, "and from that time to the present time he has unlawfully and without right used the telephone in his residence for business purposes, and has constantly transacted his business over said telephone, and refuses to pay any additional charge therefor, over and above the regular and ordinary charge for a residence telephone," and because of such refusal appellant intends to and will remove the telephone from appellee's residence. The complaint alleges that the action of the board in classing the telephone in appellee's residence as a business telephone, and demanding of him twenty-five cents extra each month over the rate charged users of other telephones classed as residence telephones, was unreasonable, arbitrary, unjust and partial, and imposed upon appellee a condition and restriction not imposed upon or required of other patrons of the company having telephones in their residences; that his use of said telephone is not different from the usual and ordinary use of telephones by patrons of the company in their different residences, and that he has complied with all the rules and regulations of the company, other than the payment of the extra twenty-five cents a month demanded of him on account of the telephone in his residence.

The gist of this suit is discrimination and partiality, and on this subject the legislature has enacted the following statute: "Every telephone company with wires wholly or partly within this State, and engaged in a general telephone business, shall within the local limits of such telephone company's business supply all applicants for telephone connections and facilities with such connections and facilities without discrimination or partiality, provided such applicants comply or offer to comply with the reasonable regula-

tions of the company; and no such company shall impose any conditions or restrictions upon any such applicant that are not imposed impartially upon all persons or companies in like situation, nor shall such companies discriminate against any individual or company engaged in any lawful business, or between individuals or companies engaged in the same business, by requiring as a condition for furnishing such facilities that they shall not be used in the business of the applicant, or otherwise for any lawful purpose.” Acts 1885 p. 151, §5802 Burns 1908. Appellee is both a stockholder and a patron of the company, and while his rights as a stockholder are not involved, he claims that the threatened action of appellant will invade his rights as a patron.

It is clear from the nature of appellant’s business and field of operations that it must be regarded as a common carrier of news, and impressed with a public interest.

1. *Central Union Tel. Co. v. State, ex rel.* (1889), 118 Ind. 194, 10 Am. St. 114. If this be true, then, at common law, its obligations to the public within the local limits of its business require that it serve all alike
2. situated, who will comply with its reasonable rules, without discrimination or partiality. *Central Union Tel. Co. v. Bradbury* (1885), 106 Ind. 1; *Hockett v. State* (1886), 105 Ind. 250, 55 Am. Rep. 201; *Vaught v. East Tenn. Tel. Co.* (1910), 123 Tenn. 318, 130 S. W. 1050, 31 L. R. A. (N. S.) 315; *Postal Cable Tel. Co. v. Cumberland Tel., etc., Co.* (1910), 177 Fed. 726. As a common
3. carrier, appellant was subject to legislative control. *Central Union Tel. Co. v. Bradbury, supra.* The legislature, in view of its right so to do, enacted the statute to which we have referred, and while this statute may be merely declaratory of the common law, as applied to telephone companies, it serves to reaffirm the law in this State, that each individual within the territory covered by such company is entitled to receive the same service as that granted to other

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like users and on equal terms. As said in *Central Union Tel. Co. v. State, ex rel., supra*: "It is a legal right which may be enforced by mandate."

The question here is not one requiring us to consider the reasonableness or unreasonableness of the proposed rental charge, nor do we understand that the charge is justified solely on the ground that appellee is within the class appellant is pleased to designate as "business men;" nor because of financial value of the service rendered appellee, for neither would be a proper basis upon which to fix its rates of service. *Postal Cable Tel. Co. v. Cumberland Tel., etc., Co., supra*. But the additional charge is made on the ground of use as a "business telephone." The exact meaning of the words "business telephone," as used in the resolution, is not clear. If it were intended thereby, in connection with the words "business men," to cover telephones used exclusively or mainly by persons conducting mercantile, manufacturing or trade pursuits only, then such resolution might be considered as carving out a class of telephones according to use for which such patrons should pay an additional rental. But, if the words "business men" are to be taken as meaning men engaged in business, as the modifying word "business" is defined, then the men thus characterized would include all who, as their chief concern, give their time and attention to any particular livelihood, occupation or employment. Century Dictionary. And in that connection, a "business telephone" would be one where the chief object of its maintenance is its use in carrying on the business in which such patron is engaged. If the resolution is to be given the latter construction, then from common knowledge we know that but a small per cent of appellant's telephone users would be exempt from the additional monthly charge. From appellee's complaint we learn that the telephone in question is located in his residence, and that appellant's rental rate for residence telephones is \$1 a month. Therefore, if appellant bases its

charges upon the use of its telephones and there is no substantial difference in the conditions, mode and kind of service rendered by it to appellee, and to other users of its telephones in dwelling-houses, it must necessarily follow that it is exacting from one of its patrons, for continuing to furnish him service, a money rental in excess of that charged and demanded of others for the same service under the same conditions. The facts stated in the complaint are admitted to be true, and, therefore, appellant is guilty of discrimination and partiality, not only upon common-law principles, but under the statute requiring not only equal facilities, but uniform charges to all under substantially the same conditions. *State, ex rel., v. Cadwallader* (1909), 172 Ind. 619; *Nebraska Tel. Co. v. State, ex rel.* (1898), 55 Neb. 627, 76 N. W. 171, 45 L. R. A. 113.

In the case of *Western Union Tel. Co. v. Call Pub. Co.* (1901), 181 U. S. 92, 21 Sup. Ct. 561, 45 L. Ed. 765, it is said: "There is no cast-iron line of uniformity which prevents a charge from being above or below a particular sum, or requires that the service shall be exactly along the same lines. But that principle of equality does forbid any difference in charge which is not based upon difference in service, and, even when based upon difference of service, must have some reasonable relation to the amount of difference, and cannot be so great as to produce an unjust discrimination." So if there is no substantial difference between the service appellant is furnishing to appellee, and that furnished to other users of residence telephones, the action of the board relative to appellee's telephone will not justify the increased rate, nor will the resolution, that all business men be charged at a certain rate for each business telephone, authorize appellant to increase and compel appellee to pay a rental not exacted from other subscribers of the same class or in like situations. *Plummer v. Hattelsted* (1908), 117 N. W. (Iowa) 680; *Crouch v. Arnett* (1905), 71 Kan. 49, 79 Pac. 1086; *Vaught v. East Tenn. Tel. Co., supra*; *Armour*

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Packing Co. v. Edison Electric, etc., Co. (1906), 115 App. Div. 51, 100 N. Y. Supp. 605. The complaint before us states a cause of action.

Referring to appellant's answer, it will be seen that the only averment tending to negative the showing made by appellee, that he is not using his residence telephone

5. otherwise than in the usual and ordinary way, is that from a certain time appellee, without right, used the telephone in his residence for business purposes, and has constantly transacted his business over that telephone. This averment does not negative the fact that appellee is not using his telephone differently from all other residential users. From aught appearing, other patrons of the company designated by it as "business men," may be using their residence telephones for business purposes, without extra charge.

Judgment affirmed.

BRETT, SURVEYOR, ET AL. v. PRETORIOUS.

[No. 7,300. Filed October 27, 1911.]

1. DRAINS.—*Repairs.—Notice.—Jurisdiction.*—Under §5631 Burns 1905, Acts 1905 p. 456, §104, providing that the repairs on drains "shall be let as a whole or by sections, as the surveyor may deem for the best interests of the parties * * * after notice first given for ten days by posting," such surveyor's jurisdiction to proceed is restricted to the method prescribed; and his action in letting such contract and in repairing the drain without the giving of such notice is void. p. 529.
2. DRAINS.—*Repairs.—Assessments.—Notice.—Complaint.*—A complaint alleging that the county surveyor, without notice, and without bids, let a contract for the repair of a drain extending through plaintiff's land, that he made an assessment for the expenses thereof and placed such assessment on the tax duplicates against plaintiff's property, and praying that such assessment be canceled and declared void, is sufficient. p. 530.
3. DRAINS.—*Repairs.—Jurisdiction.—Injunction.—Appeal.*—Where a drain is repaired without giving the affected landowners any

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notice thereof, and without receiving any bids for the making of such repairs, the remedy is by injunction and not by appeal. p. 530.

4. TRIAL.—*Verdict.*—*Issues Decided.*—A general finding constitutes a finding on every issue in favor of the prevailing party. p. 531.
5. APPEAL.—*Weighing Evidence.*—Where there is any evidence tending to support the finding of the trial court, the judgment will not be disturbed. p. 531.

From Wabash Circuit Court; *U. S. Lesh*, Special Judge.

Suit by George Pretorious against Charles H. Brett, as county surveyor of Wabash county, and others. From a decree for plaintiff, defendants appeal. *Affirmed.*

Alvah Taylor and *Fred E. Sutton*, for appellants.

D. F. Brooks, for appellee.

FELT, P. J.—This is a suit by appellee, against appellants Charles H. Brett, surveyor, J. P. Noftzger, auditor, and John H. Morrow, treasurer, of Wabash county, Indiana, to declare void a certain assessment made against the lands of appellee for cleaning out a public ditch, and to have said assessment canceled upon the records and tax duplicates of the auditor and the treasurer of Wabash county.

The errors assigned and presented by the briefs are that the court erred in overruling each appellant's separate demurrer to appellee's complaint, and in overruling the motion for a new trial.

The complaint alleges, in substance, that appellee was and is the owner of certain real estate in Wabash county, Indiana; that during the months of February and March, 1906, appellant Brett hired men by the day to clean out a public drain, known as the Urbana ditch; that before hiring said men he did not post notices for bids, nor let said work by contract to the lowest and best bidder; that said ditch was cleaned out in the manner aforesaid, without the consent of appellee, and without any notice to him whatsoever; that on June 6, 1906, long after the work was completed, said Brett made assessments on the various tracts of land affected by

said ditch, including the land of appellee, to secure funds to pay for the work aforesaid; that appellee's real estate was assessed for \$42.37, and on June 20, 1906, appellant Brett certified such assessment to the auditor of Wabash county, who placed it upon the tax duplicates of said county, against the land of appellee; that said assessment will be collected, unless canceled and set aside, and that it is largely in excess of the benefit to appellee's said land.

Appellant Brett assumed to proceed in accordance with §10 of the act of 1905 (Acts 1905 p. 456, §5631 Burns 1905),

which provides that the surveyor of the county in

1. which the proceedings were had establishing the ditch, should keep such ditch in repair, and further provides that "such work or repairs shall be let as a whole or by sections, as the surveyor may deem for the best interests of the parties to be affected and the lowest and best bidder or bidders, after notice first given for ten days by posting in three public places in each township * * * and one at the door of the court house." Such section further provides that "for the purpose of reimbursing the county treasury the surveyor, as soon as the contracts for the repairs are made, and before any work is done thereon, shall apportion and assess the costs thereof upon the lands and corporations to be benefited by such repairs in proportion to such benefits and in no case in excess of the benefits." The statute also provides for notice of the assessment by posting, and for an appeal from the assessment to the circuit or superior court, which appeal shall be tried by the judge, the only questions available being the necessity of the repairs, the cost thereof, and whether appellant's lands are benefited, and, if so, the amount of his assessment.

It is insisted that the complaint is insufficient and that the suit cannot be maintained, because an adequate remedy at law is provided by an appeal to the circuit or superior court.

The statute authorizing the surveyor to keep public ditches

in repair, requires that a notice of the letting be posted, and that the work be let by contract, as heretofore shown. It has been held frequently that where the statute prescribes the method to be pursued by a public officer or an inferior tribunal, there must be a substantial compliance with the statute, or the acts of such officer or tribunal will be void. The right to notice is fundamental, and before a lien or assessment can be levied and enforced upon real estate, in a case like this, the statutory notice must be given, for without it there is no jurisdiction to proceed. Jurisdiction of the person is as essential to a valid assessment as jurisdiction of the subject-matter. *Gavin v. Board, etc.* (1885), 104 Ind. 201; *Hobbs v. Board, etc.* (1885), 103 Ind. 575; *Everett v. Deal* (1897), 148 Ind. 90; *English v. Smock* (1870), 34 Ind. 115, 7 Am. Rep. 215; *Silver, Burdett & Co. v. Indiana State Board, etc.* (1905), 35 Ind. App. 438; *Tucker v. Sellers* (1892), 130 Ind. 514, 519.

The averments of the complaint show a total failure to comply with the statute, as to notice and the letting
2. of the contract. The demurrer admits the facts that are well pleaded. The complaint states a cause of action, and the demurrer thereto was properly overruled.

It is contended that the remedy is by appeal, and not by suit to have the assessment annulled. On the facts stated in the complaint, the assessment is void, and a suit
3. will lie to set it aside and enjoin its collection. The rule is different where the court obtains jurisdiction, and the action taken is alleged to be irregular or erroneous. In such case, the remedy by appeal provided by the statute is the only one available. *Gavin v. Board, etc., supra*, at page 206; *Hobbs v. Board, etc., supra*, at page 581; *Thompson v. McCorkle* (1894), 136 Ind. 484, 493, 43 Am. St. 334; *Smith v. Smith* (1902), 159 Ind. 388.

It is further contended that appellee is estopped to deny notice and the letting of a contract. The answers were by

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way of estoppel, and the trial court passed on the
 4. evidence admitted under such answers, and made a
 general finding in favor of appellee, that necessarily
 is a finding in his favor on the question of estoppel.

The motion for a new trial was urged on the grounds that
 the decision is not sustained by sufficient evidence and is
 contrary to law.

This court will not consider the evidence, except to de-
 termine whether there is a failure of proof on any material
 issue in the case. Where there is a conflict of evi-
 5. dence, or where reasonable minds may draw different
 inferences therefrom, this court will not disturb the
 finding of the lower court on the evidence. There was evi-
 dence strongly tending to support the answers of estoppel,
 but we cannot say that it was so conclusive as to preclude the
 finding of the trial court. *Town of Monticello v. Condo*
 (1911), 47 Ind. App. 490; *Stroble v. City of New Albany*
 (1896), 144 Ind. 695, 699; *City of Valparaiso v. Schwerdt*
 (1907), 40 Ind. App. 608. The presumption is in favor of
 the trial court. No reversible error has been pointed out by
 appellants.

Judgment affirmed.

TIMMONDS ET AL. v. TAYLOR.

[No. 7,225. Filed October 31, 1911.]

1. PLEADING.—*Complaint.—Sufficiency.—Demurrer.—Special Find-
 ings.—Conclusions of Law.*—The overruling of a demurrer to a
 complaint need not be considered on appeal, where the exceptions
 to the conclusions of law upon the special findings present the
 same questions. p. 533.
2. TRIAL.—*Conclusions of Law.—Exceptions.—Special Findings.*—
 An exception to the conclusions of law admits, for the purposes
 of such exception, that the facts were correctly found. p. 535.
3. SPECIFIC PERFORMANCE.—*Contract to Convey Real Estate.—
 Possession.*—An oral contract by a father to purchase real estate
 for his daughter will be specifically enforced, where she was put

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in possession under the contract, where the purchase price was paid, and where the father repudiated the contract. p. 535.

4. SPECIFIC PERFORMANCE.—*Contracts.—Demand.—When Unnecessary.*—Where the vendor repudiates his contract to convey, or places himself in a position which would render a demand unavailing, no demand is necessary before bringing a suit for specific performance. p. 536.
5. SPECIFIC PERFORMANCE.—*Refusal to Perform Contract.—Demand.*—Where the contract fixes the time for making a conveyance upon payment of the purchase price, a failure to make the conveyance perfects the purchaser's right to compel the performance of the contract. p. 536.
6. FRAUDS, STATUTE OF.—*Contracts to Convey Real Estate.*—The fifth clause of §7462 Burns 1908, §4904 R. S. 1881, providing that "no action shall be brought in any of the following cases: * * * Fifth. Upon any agreement that is not to be performed within one year from the making thereof," does not apply to an oral contract that might be performed within one year, nor to any contract concerning real estate. p. 537.

From Clark Circuit Court; *Thomas B. Buskirk*, Special Judge.

Suit by May F. Taylor against Maria B. Timmonds and another. From a decree for plaintiff, defendants appeal. *Affirmed.*

Henry A. Burt, *James E. Taggart* and *J. K. Marsh*, for appellants.

Laurent A. Douglass, for appellee.

ADAMS, J.—Action by appellee against appellants to enforce the specific performance of a contract entered into between the husband of appellee and appellant Richard H. Timmonds, for the conveyance to appellee of certain real estate in the city of Jeffersonville. There was a trial by the court, and, upon request, a special finding of facts was made, and conclusions of law were stated. A decree was entered on the conclusions of law in favor of the appellee, and a commissioner was appointed to execute a deed, conveying to appellee the interests of appellants in said real estate.

Exceptions were taken separately by appellants to each conclusion of law. The complaint is in one paragraph, to

which appellants separately filed a demurrer for want of sufficient facts, which demurrers the court overruled. These rulings constitute the first error assigned. The other errors assigned and relied on for reversal arise on the separate exceptions of appellants taken to each conclusion of law, and the overruling of the separate motion of each appellant for a new trial.

It is unnecessary to consider the overruling of a demurrer to a complaint, where the court finds the facts and states conclusions of law thereon, and where the exception

1. to the conclusions of law, upon the facts found, presents the same question as the demurrer to the complaint. *Fry v. Hare* (1906), 166 Ind. 415; *Board, etc., v. Wolff* (1906), 166 Ind. 325; *Ross v. Van Natta* (1905), 164 Ind. 557; *Goodwine v. Cadwallader* (1902), 158 Ind. 202; *Philip Zorn Brewing Co. v. Malott* (1898), 151 Ind. 371; *Runner v. Scott* (1898), 150 Ind. 441; *Woodward v. Mitchell* (1895), 140 Ind. 406; *Eisman v. Whalen* (1907), 39 Ind. App. 350; *Chicago, etc., R. Co. v. Yawger* (1900), 24 Ind. App. 460.

The facts as found by the court, are, briefly, as follows: Appellee is a daughter of appellant Richard H. Timmonds, and a step-daughter of appellant Maria B. Timmonds. In September, 1904, appellee was and still is the wife of Harvey Taylor. In September, 1904, appellee's father was engaged in the plumbing business in the city of Jeffersonville, and his wife, appellant Maria B. Timmonds, was his bookkeeper and the general office manager of the business. At said time, Richard H. Timmonds, with the knowledge and consent of his wife, entered into a contract with appellee's husband, whereby said Timmonds agreed to purchase a house and lot for appellee, as a home for herself and children, in consideration that her husband would work for him as a plumber at the rate of \$1.25 a day, instead of \$2.50 or \$3 a day. Said husband was at that time a competent plumber, and the wages then paid for competent plumbers in Jeffer-

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sonville and vicinity was from \$2.50 to \$3 a day. It was agreed that the difference between the amount appellee's husband was to receive and the reasonable wages for plumbers in that vicinity was to be a credit on the purchase price of said home for appellee, until such difference paid for said home, when the property was to be conveyed to appellee. Upon the purchase of said house and lot, appellee was to be placed in possession thereof, and was to occupy it without paying any rent or taxes. Pursuant to said contract, appellee's husband entered the employ of Richard H. Timmonds on September 1, 1904, and continued therein for two years and eight months, and the difference between the wages paid, and the wages earned by him during said time amounted to the sum of \$1,042.50. On October 1, 1904, appellant Richard H. Timmonds purchased for appellee the real estate in controversy, and paid therefor the sum of \$535. Subsequently improvements, of the value of \$203.75, were made on said property, and taxes, to the amount of \$46.88, were paid thereon by appellant Maria B. Timmonds. At the time of the purchase of said real estate appellee's father caused the title thereof to be placed in the name of his wife, who now claims to own it. When said property was purchased, appellee was put in possession thereof by the appellants, under the contract made by appellee's husband and her father. During the time appellee's husband worked for her father, under said contract, appellant Maria B. Timmonds continued as general manager of the office of her husband, and knew that appellee's husband worked for \$1.25 a day, and at no time, until after appellee's husband quit work, did said Maria B. Timmonds make any claim to said property, but possession was then demanded of appellee and her husband, and suit was commenced against appellee's husband for possession. In carrying out the agreement, as he did, appellee's husband acted in good faith, and had no knowledge, until after he quit work, that Maria B. Timmonds would claim ownership

of the property, or dispute his right of possession thereof for the use and benefit of his wife and children.

The court, upon the facts found, stated, as conclusions of law, that the law is with appellee; that since the contract was made by appellee's husband for her benefit, she has a right to sue thereon; that appellee entered into actual possession of the property, pursuant to the contract made between her husband and her father, and is entitled to the specific performance thereof; that by accepting the work of appellee's husband, until the difference between the amount earned and the amount paid was equal to the cost of the property, appellants are estopped from now denying the contract, or refusing to execute the deed; that appellants should specifically carry out said contract, and convey said property to appellee, and that a commissioner should be appointed to make the conveyance in the event of failure. A decree was entered for appellee in accordance with the findings, a commissioner was appointed and directed to execute the conveyance, and costs were adjudged against appellants.

When an exception is taken to conclusions of law, it is taken as admitted, for the purposes of the exception, that the facts have been fully and correctly found, and

2. the only question is, Does the conclusion correctly state the law, assuming the facts found to be sustained by the evidence?

In this case the court found that there was a contract for the conveyance of real estate to appellee; that the contract was based on the promise of full payment; that ap-

3. pellee was put in possession by appellants, under the contract; that the consideration was fully paid, but that appellants have repudiated the agreement. Upon such a state of facts, appellee was clearly entitled to enforce the specific performance of her contract. It is well settled that a parol agreement for the conveyance of real estate will be specifically enforced in equity, where possession has been

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taken under the contract, and the consideration fully paid in reliance on the contract. *Denlar v. Hile* (1890), 123 Ind. 65; *Burns v. Fox* (1888), 113 Ind. 205; *Cutsinger v. Ballard* (1888), 115 Ind. 93; *Wallace v. Long* (1886), 105 Ind. 522, 55 Am. Rep. 222.

Appellants insist that the complaint is insufficient, for the reason that there is no averment of a demand before suit was brought. As we have seen, the action of the court in holding the complaint sufficient in this case is not material. The same question is presented on the exception to the conclusions of law; and appellants contend that a failure to find that a demand was made before bringing suit was, in effect, a finding against the party having the burden of proof, and, therefore, there was error in the statement of the conclusions of law. As a general rule, a party cannot enforce the specific performance of a contract for the conveyance of real estate until he has made a demand, and given the party bound an opportunity to carry out his contract; but the law will not require an idle ceremony, and when it appears that the party who has covenanted to make the deed denies the contract or puts himself in an attitude where a demand would be unavailing, no demand is necessary. *Burns v. Fox, supra*; *Cutsinger v. Ballard, supra*. In this case, appellants not only repudiated the contract, after appellee's husband had by his labor more than paid the entire cost of the property with improvements, but had brought suit for possession, had been defeated, and had taken a new trial as of right, under the statute, before this suit was brought. The facts shown in the finding do not make out a case where a demand is necessary.

Where the agreement fixed the time for making the conveyance, as in this case, upon full payment of the purchase price, it was the duty of appellants to execute a proper deed without demand, and, upon failure so to do, appellee's right of action was complete, as far as

it was affected by the question of demand. *Maris v. Masters* (1903), 31 Ind. App. 235.

Appellants further urge that the trial court erred in its conclusions of law, for the reason that the contract forming the basis of the suit is within the fifth subdivision of 6. the statute of frauds (§7462 Burns 1908, §4904 R. S. 1881), in that the contract was in parol, and was not to be performed within a year from the making thereof. There is no merit in this objection. In the first place, the fifth clause applies only to contracts that are not to be performed within a year by the express stipulation of the parties, and not to contracts which might be performed within a year. *American Quarries Co. v. Lay* (1906), 37 Ind. App. 386; *Hinkle v. Fisher* (1885), 104 Ind. 84, 87; *Indiana, etc., R. Co. v. Searce* (1864), 23 Ind. 223, 227; *Wiggins v. Keizer* (1855), 6 Ind. 252, 254. It has also been held that the fifth clause of the statute of frauds does not relate to agreements concerning real estate. *Railsback v. Walke* (1882), 81 Ind. 409, 412; *Baynes v. Chastain* (1879), 68 Ind. 376, 380; *Fall v. Hazelrigg* (1874), 45 Ind. 576, 586, 15 Am. Rep. 278; *Cochran v. Ward* (1892), 5 Ind. App. 89, 92, 51 Am. St. 229.

Rulings of the court on the admission of certain evidence are complained of, but we do not think such rulings were prejudicial to appellants. From a reading of the record, we are well satisfied that the case was fairly tried, and a correct conclusion reached.

Judgment affirmed.

**E. I. DUPONT COMPANY v. PENNSYLVANIA AND
INDIANA COAL COMPANY.**

[No. 7,331. Filed October 31, 1911.]

ATTACHMENT.—Creditors.—Filing Claims.—Statutes.—Under §978 Burns 1908, §943 R. S. 1881, providing that "any creditor of the defendant, upon filing his affidavit and written undertaking, as hereinbefore required of the attaching creditor, may, at any time before the final judgment * * * make himself a party * * * and file his claim," the original plaintiff in an action in attachment may file, as a creditor, a claim omitted from his complaint; and striking out its ancillary complaint as a creditor constitutes prejudicial error, which is not cured by permitting the plaintiff to file additional paragraphs of original complaint, since it cannot amend the affidavit upon which the attachment is based.

From Greene Circuit Court; *Charles E. Henderson*, Judge.

Action by the E. I. DuPont Company against the Pennsylvania and Indiana Coal Company. From a judgment for plaintiff for part of its demand, it appeals. *Reversed.*

William L. Slinkard, for appellant.

Webster V. Moffett, for appellee.

IBACH, J.—This action was brought by appellant against appellee, on account, for goods and merchandise sold. Appellant, being a nonresident, filed a cost bond and an affidavit and undertaking in attachment. No contest was made in the attachment proceedings. Appellee filed an answer in general denial. The cause was submitted for trial without a jury, and the judge took the evidence under advisement before rendering his findings. The evidence showed that some of the goods for which the action was brought were furnished under a written contract, and the judge indicated to appellant that he would not hold the attachment good as to the portion sold under the written contract. Appellant was then allowed to file its ancillary complaint, affidavit and bond as another creditor in attachment on the items covered by the written contract. Appellee moved to dismiss this an-

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cillary complaint and proceedings. Appellant then filed a second and third paragraph to the original complaint, the second covering the items of the original complaint which were not covered by the written contract and the third embracing the items under the written contract. The court sustained appellee's motion to strike out the ancillary complaint and affidavit in such proceeding. Appellee filed a verified pleading, called an answer, setting up matter in abatement of appellant's second and third paragraphs of complaint, and asking that these paragraphs be tried as a separate cause of action. Appellant's demurrer to this answer was overruled, and it filed a reply in general denial. The court found for appellant on the original complaint for the amount of the items not covered by the written contracts, and ordered the property attached to be sold to pay this amount. It also found as to all other matters for appellee on the plea in abatement, and ordered the third paragraph of the complaint tried separately. Appellee filed its answer to the third paragraph of complaint. The court found for appellant, rendering a personal judgment for the amount embraced under this paragraph. Appellant's motions to modify the judgment, for a finding that it was entitled to recover the whole amount under the attachment, and for a new trial were overruled.

It is assigned that the court erred (1) in overruling appellant's demurrer to the special answer of appellee, (2) in sustaining appellee's motion to strike out appellant's ancillary complaint and affidavit in attachment, (3) in overruling appellant's motion to modify the judgment, and (4) in overruling appellant's motion for a new trial.

The parties in their briefs spend much time in arguing whether the proceedings constituted one or more than one trial, and it must be admitted that the record as to this point, as well as to other points, is confusing, which is apparent from the foregoing summary of its contents. The disposition made of the second error assigned will make it

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unnecessary for us to enter into this matter, or to consider the other errors assigned. The second assignment presents the question, Has a plaintiff the right as a creditor, to file an ancillary complaint in his own attachment suit? This question is entirely novel, so far as we are able to ascertain; and as we cannot be led by direct authority, it becomes a matter of statutory interpretation. The procedure in attachment is entirely regulated by statute. Section 978 Burns 1908, §943 R. S. 1881, provides that "any creditor of the defendant, upon filing his affidavit and written undertaking, as hereinbefore required of the attaching creditor, may, at any time before the final judgment in the suit, make himself a party to the action, file his complaint, and prove his claim or demand against the defendant." There is no limitation on the term "creditor" in the wording of the statute, and no implication that the creditor who may file his complaint therein must be other than the attaching creditor. We can conceive of no reason, conflicting with the spirit or the letter of the statute, why the original attaching creditor, who finds that he has a claim against the defendant, which is not contained in his original complaint, may not file an ancillary complaint as a creditor. To deprive him of this right would be to put him at a disadvantage compared with other creditors, and would compel him, if he had a cause of action against the defendant in which attachment is proper, and which, for any reason, he had omitted to include in his original complaint and affidavit, to go to the trouble and expense of again instituting attachment proceedings, thus multiplying litigation, and increasing costs, although it is among the very purposes of the statute to avoid such. Appellant filed its ancillary complaint, affidavit and bond, as a creditor, in the proceeding in due time, before final judgment in the suit; therefore the court erred in striking them out on appellee's motion.

It may be contended that this error was made harmless to appellant, because the court allowed it to file additional paragraphs to its original complaint, setting up the same

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matter found in the pleading stricken out. But appellant could not amend its original affidavit and thus bring the new matter alleged in the additional paragraphs of complaint under the original attachment proceedings. The affidavit must set forth the nature of the claim, and cannot be amended in that respect. §950 Burns 1908, §916 R. S. 1881; *Fargo & Co. v. Cutshaw* (1895), 12 Ind. App. 392. The error committed by the trial court in striking out appellant's pleading and affidavit deprived it of its statutory right, as a creditor, to have the benefit of the attachment proceedings already begun, and for this error the judgment is reversed and the cause remanded, with directions to grant a new trial, to overrule appellee's motion to strike out appellant's ancillary complaint and affidavit as a creditor, and for further proceedings not inconsistent with this opinion.

BRADLEY ET AL v. HARTER.

[No. 6,751. Filed February 15, 1911. Rehearing denied June 30, 1911. Petition to transfer dismissed October 31, 1911.]

1. **APPEAL.—Briefs.—Failure to set out Questioned Pleadings or Evidence.**—A failure by appellants to set out in their brief the questioned pleadings, or the evidence, or its substance, constitutes a waiver of all questions thereon; and a mere reference to the place in the transcript where such pleadings, or evidence, may be found, is not sufficient. p. 543.
2. **APPEAL.—Briefs.—Omission of Special Findings.—Supply by Appellee.**—Questions on the special findings in a case will be considered, although such findings are not set out in appellant's brief, where appellee set them out in his brief. p. 543.
3. **APPEAL.—Briefs.—Special Findings.—Evidence.—Failure to set out.—Presumptions.**—Where appellants' brief fails to set out the evidence, or the substance thereof, the presumption is that the special findings were supported thereby. p. 545.
4. **TRIAL.—Special Findings.—Failure to Find Fact.—Effect.**—A failure to find a fact constitutes a finding against the party having the burden of proving such fact. p. 546.
5. **VENDOR AND PURCHASER.—Contracts.—Sales of Lots.—Improvements.—Special Findings.**—Special findings that a vendor con-

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tracted with three purchasers to convey to them at or before the expiration of three years certain land by them to be platted, agreeing that as they sold the lots platted therefrom to execute deeds therefor and to credit the purchase price thereof to such purchasers, that he further agreed to advance the money necessary for certain street improvements, charging the amount used in addition to the original purchase price, that the interest of two of such purchasers was purchased by two others, that the remaining one of the original purchasers executed an interest-bearing receipt for money advanced, that such purchaser had power to receive and expend money for such improvement, that he did not have power to execute such receipt, that such vendor had notice thereof, that the vendor performed all parts of the contract to be performed on his part, and that such sum so advanced has never been repaid to the vendor, and is due, sustain conclusions of law in favor of the vendor. p. 546.

From Superior Court of Madison County; *Cassius M. Greenlee*, Judge.

Action by Jacob H. Harter against Austin F. Bradley and others. From a judgment for plaintiff, defendants appeal. *Affirmed.*

Walker & Foster and *Roby & Watson*, for appellants.
Bagot & Bagot, for appellee.

IBACH, J.—This action was instituted by appellee to recover from appellants the sum of \$3,019.95, with interest from December 7, 1891, alleged to have been paid by appellee on account of the improvement of Fourteenth street, in Englewood addition to the city of Anderson. Upon issues formed, the cause was tried by the court, and, by request, a special finding of facts was made, and conclusions of law were stated thereon in favor of appellee. Over appellants' motion for a new trial, judgment was rendered, that appellants take nothing by the cross-complaint, and that appellee recover on his complaint.

Appellants, by their assignment of errors, seek to question the sufficiency of various pleadings, and, under their motion for a new trial, the sufficiency of the evidence to sustain the special findings, and certain rulings on the exclusion of evidence.

It is insisted by appellee that no question is presented on these assignments, as appellants have failed to set out in their brief so much of the record as presents the error

1. or objection relied on, in that none of such pleadings nor the demurrers thereto are set out, nor is the substance of any of them set out; that there is a failure to set out the evidence or the substance thereof. An examination of the briefs supports appellee's contention. It has been held many times that where briefs do not comply with the rules, as to the important matters here claimed to have been omitted, the errors based on such portion of the record will be deemed waived. *Shatz v. Alexandria Gas Co.* (1905), 35 Ind. App. 310; *Springer v. Bricker* (1905), 165 Ind. 532; *Talbott v. Town of New Castle* (1907), 169 Ind. 172; *Miedreich v. Frye* (1908), 41 Ind. App. 317; *Knickerbocker Ice Co. v. Gray* (1905), 165 Ind. 140. The rule is not satisfied by a mere reference to the place in the transcript where the alleged error may be found. *Ledbetter v. Coggeshall* (1906), 37 Ind. App. 124.

Appellants also have failed to set out in their brief the special finding of facts, the sufficiency and correctness of which is denied by them. This omission has been

2. supplied by appellee, and we therefore consider it.

The substance of the special findings is as follows: That on October 20, 1891, appellee entered into a contract with Austin F. Bradley, Harvey B. Stout and Joseph A. McCoy, relating to the sale of some land, known as Englewood addition to Anderson; that Fourteenth street was one of the streets in said addition, and was at the time being improved; that one of the stipulations in the contract was that appellee should advance the expense of the improvement of said Fourteenth street, and the cost thereof should be charged to Bradley, Stout and McCoy; that appellee, under the contract paid for said improvement the sum of \$3,019.95; that, while this work was in progress, McCoy assigned his interest in the contract to Bradley, and Bradley assigned a third interest in the

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contract to appellant Cooper; that, as a part of the purchase price of said real estate, Cooper assumed the obligations of McCoy, under the contract, except the obligation to give notes for any balance that might be owing after three years; that, while the work of improving said street was still in progress, appellant Stout sold and transferred his interest to appellant Backus, and Backus likewise assumed the obligations of Stout, excepting the obligation to execute notes for the balance of the purchase money unpaid at the expiration of three years; that all the assignments were made with the approval and consent of appellee; that between December 7, 1891, and August 9, 1892, appellee paid for the improvement of Fourteenth street the sum of \$3,019.95; that said amount was paid in various sums from time to time as the work progressed, and on August 9, 1892, appellant Bradley executed to appellee his receipt or contract concerning said money and payment as follows:

“Anderson, Indiana, August 9, 1891.

Received of Jacob H. Harter, \$3,019.95, on account of Fourteenth street pay-roll, to draw interest at the rate of six per cent from December 7, 1891.

Bradley, Backus and Cooper, per A. F. Bradley.”

That until August 9, 1892, the money needed for expenses connected with making said improvement was advanced by appellee, part of the time to Bradley and part of the time to Stout; that during the time of the first contract, a partnership existed between Bradley, Stout and McCoy; that after the purchase by Bradley of the interest of McCoy, a non-commercial partnership existed between Bradley and Stout, until Cooper was brought into the company; that from the time of the execution of the first contract with Cooper, until the contract was made with Backus, a noncommercial partnership existed, that involved all the interests of Bradley, Stout and Cooper, and their respective obligations and duties in and pertaining to said real estate and said contract; that from and after the execution of said contract between Brad-

ley, Stout, Cooper and Backus, until October 20, 1894, a noncommercial or nontrading partnership existed between them, and its business pertained to the matters involved in said contract, and the performance by said partnership of the parts thereof to be performed by said Bradley, Backus and Cooper, and said firm did business under the firm name of Bradley, Backus & Cooper; that Bradley had full power to receive and pay out money for the improvement of Fourteenth street; that appellee had, or might have had, notice and knowledge, at the time of the execution of the receipt of copy set out in the findings, that Bradley did not have power and authority to execute the receipt for himself and his associates, Backus and Cooper; that no part of the money advanced by appellee for the improvement of said street has ever been repaid to him; that he paid said sum pursuant to the provisions of the contract referred to in these findings, and, at the time of the commencement of his action, the amount was long-past due, and there is due to him from appellants the sum of \$4,863.52. It is further found that plaintiff performed all the parts of the contract on his part to be performed, according to the terms thereof. Upon the foregoing facts, the court stated the following conclusions of law: “(1) The law is with plaintiff, and he is entitled to recover from defendants the sum of \$4,500, together with his costs and charges laid out and expended, with relief from valuation and appraisement laws. (2) Defendants are entitled to take nothing on account of their cross-complaint.”

A reversal is asked, for the reason that the evidence does not sustain the special findings. Appellants seek to challenge the finding of the court on the evidence, and

3. yet no statement of the evidence or copy of the findings is set out in their brief. We are able, from the brief, to find a few isolated portions of the evidence, but such are not sufficient to enable us to determine whether the

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court failed to find all the necessary facts, or whether the evidence did not sustain those found. It is a recog-

4. nized rule, however, that a failure to find any material fact is equivalent to finding against the party upon whom rests the burden of proving such fact. The trial court having found the facts as it did, we are required to presume that they are correct, and that they are founded upon the competent evidence produced at the trial. As the evidence does not appear in the brief, it must be concluded
5. that there was no evidence contrary to the finding of the court. Such being the case, the facts found by the court fully sustain both conclusions of law.

Judgment affirmed.

ON PETITION FOR REHEARING.

IBACH, J.—Appellants have filed an extensive and forceful brief in support of their petition for a rehearing. They contend that the court erred “in refusing to review and

5. pass upon the assignment of error as to special finding seventeen, as being wholly outside of the issue.” Said finding is as follows: “That the plaintiff performed all the parts of said contracts on his part to be performed, according to the terms thereof.”

Appellants also claim that the court erred in failing to determine whether the special finding of facts sustains the first conclusion of law stated, which is as follows: “That the law is with plaintiff, and he is entitled to recover from defendants the sum of \$4,500, together with his costs and charges laid out and expended in this action, with relief from valuation and appraisal laws.” Appellants concede that the vital and controlling question is presented by the facts found and the conclusions of law stated. The questions raised by this petition for a rehearing were presented in the original briefs, and were considered by this court. We quote from the original opinion: “Such being the case, the facts found by the court fully sustain both the conclusions of law.”

We have, however, again carefully examined the briefs presented by appellant, together with the record before us, and we observe that the trial court found that appellee “performed all the parts of the contract on his part to be performed; that he provided, and paid to appellants, the money for the improvement of Fourteenth street; that the street was improved, and appellee charged the cost thereof to appellants; that said amount is unpaid.” Whether this finding is within the issues is not for us to decide, as the issues have not been presented for the consideration of this court.

It is further insisted by appellant, that the provision in the contract for the improvement of Fourteenth street was not an independent contract, and that the money paid by appellee was not to be repaid until after the land contract had been disposed of. The contract between the parties stated particularly that the land—about fifty-eight acres, the actual amount to be determined thereafter—was sold by appellee to appellants for \$1,000 an acre. It also contained the provision that if the land was not paid for, in the manner specified, within three years, appellants were to execute their note and mortgage to appellee for the unpaid balance of the agreed purchase price, and he was to convey to them the land remaining unsold. We find no mention that any money paid out by appellee for the improvement of Fourteenth street was taken into consideration in the final settlement for the sale and purchase of the land. The only manner in which the improvement of Fourteenth street is referred to in the contract, is that appellee was to make such improvement, and charge the expense thereof to the buyers of the property. There is no uncertainty in this contract, and it cannot be successfully claimed that the sum of money advanced for such improvement is to be taken as a part of the purchase price of the real estate, or is to be considered in closing up the agreement relating to the sale thereof.

It also appears from the findings, that when appellant Cooper became one of the company, he, together with ap-

pellants Bradley and Stout, entered into the following agreement:

“It is further agreed that said Bradley and Stout will assume and pay all bills of every kind for surveying and platting, and for recording plats, etc., contracted by them up to this time, except the bills for advertising in the newspapers in Anderson, which bills are to be paid by the three parties hereto, each paying a third thereof, and likewise in the future, each party hereto is to furnish and pay a third of all expenses contracted in laying out said lands, grading streets, advertising and selling lots, and all other expenses connected with the selling of said land.”

In addition to this, the findings show that when Backus bought into the firm, the following agreement was entered into between the appellants:

“It is further agreed that said Stout is to pay his share of the bills due and debts contracted up to this time, except the debt contracted for the improvement of Fourteenth street, running through said land, and all bills made in the future are to be paid in equal amounts by Bradley, Cooper and Backus.”

It must be conceded that the debt relative to the improvement of Fourteenth street was one to be paid to appellee by appellants, in addition to the land when the improvement was completed. This is fully found in the court's findings and in the record.

The court finds that the money, by means of which said street was improved, was advanced by appellee to appellants Stout and Bradley, before appellant Cooper became one of the firm. After Backus and Cooper entered the firm, said money was paid out by Bradley, for the improvement of the street. When the street was completed, and the cost thereof was known and paid, Bradley executed the following instrument to appellee:

“Anderson, Indiana, August 19, 1892.

Received of Jacob H. Harter \$3,019.95, drawing interest at six per cent from December 7, 1891.”

In view of these agreements, set out in the court's findings, and in view of the further findings that said sum of money was paid to appellants to be used in improving such street through the land purchased by them, in accordance with the terms of the original contract between the parties, and that said sum has never been repaid to appellee, the court was justified in stating the conclusions of law that it did, as they are supported fully by the facts as found. We are content to abide by the opinion formerly expressed on this point, which is the only one presented by the appeal.

Petition for rehearing overruled.

HARROD v. BISSON.

[No. 6,885. Filed February 23, 1911. Rehearing denied June 1, 1911. Transfer denied October 31, 1911.]

1. **PHYSICIANS AND SURGEONS.—Malpractice.—Evidence.—Cross-Examination.—Fraudulent Conveyance of Property to Escape Judgment.**—In an action against a physician for malpractice, the defendant may be asked on cross-examination whether, just before, or after, the action was brought, he had conveyed his real estate to his wife, such defendant having testified that he had not been negligent in his treatment. *Miller v. Dill*, 149 Ind. 326, distinguished. p. 551.
2. **NEGLIGENCE.—Evidence.—Subsequent Repairs.**—In an action for negligence caused by defects, evidence of defendant's subsequent repair of such defects is not admissible. p. 555.
3. **PHYSICIANS AND SURGEONS.—Malpractice.—Evidence.—Opinions.**—In an action against defendant for malpractice, the testimony of a physician that the bones of the maimed hand in question were in the same relationship on the day of the trial as at the time the hand was dressed, is not harmful on the ground that he had not given the facts on which his conclusion was based, where he had testified fully theretofore as to the condition of such hand, it being fairly presumed that his opinion was based on his statement thereof. pp. 556, 557.
4. **APPEAL.—Reversal.—Defects.**—A judgment should not be reversed, where the merits of the case have been determined. p. 557.
5. **TRIAL.—Instructions.—Directing Recovery upon Proof of Paragraph of Complaint.—Interrogatories.**—An instruction that if the plaintiff has proved the material allegations of any of the three

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paragraphs of her complaint, the jury may find for the plaintiff, is harmless, where other instructions outlined the conditions under which she might recover; and especially where the answers to the interrogatories showed that the plaintiff was free from contributory negligence, and also indicated that no harm resulted from such instruction. p. 558.

6. TRIAL. — *Instructions. — Contributory Negligence. — Interrogatories.*—An instruction that the burden of proving contributory negligence is on defendant, and that “unless he has shown the same by a preponderance of the evidence,” he should lose on such issue, does not require that the testimony introduced by defendant alone must show such freedom. p. 559.
7. DAMAGES.—*Deformities. — Worry. — Negligence.*—Personal disfigurement, resulting from negligent injury, and also “anxiety and distress of mind” reasonably caused by the injury complained of, constitute proper elements of damage. p. 560.
8. DAMAGES.—*Injured Wrist. — Worry.*—In an action for negligent injuries to plaintiff’s wrist, she is entitled to damages for any pain, suffering, worry, or anxiety experienced in the actual use of such wrist and which is the direct result of the maimed condition thereof. p. 561.
9. LIMITATION OF ACTIONS.—*Amended Complaint. — Tort. — Contract. — Physicians. — Malpractice.*—In an action against a physician for damages for malpractice, an amended complaint sounding in tort, filed more than two years after the negligence alleged, is not barred by the two-year statute of limitations, where the original complaint, also sounding in tort, was filed within such time. p. 561.

From Allen Circuit Court; *E. O’Rourke*, Judge.

Action by Mary Bisson against Morse Harrod. From a judgment for plaintiff, defendant appeals. *Affirmed.*

Fred Shoaff and *Zollars & Zollars*, for appellant.

A. H. Bittinger and *A. E. Hauck*, for appellee.

HOTTEL, J.—This is an action against appellant, to recover damages alleged to have resulted from the negligent and unskilful manner in which he reduced and treated appellee’s fractured and injured wrist and hand. The amended complaint is in three paragraphs. The substance of the first is as follows: That on August 25, 1904, appellant was a practicing physician and surgeon; that on said day appellee fell from a chair, and dislocated, bruised and injured the bones in her left wrist and hand; that appellant

undertook to set said bones, and to cure such injuries, but, in his endeavor so to do he was so unskilful, negligent and unprofessional that, by reason of said improper treatment, and unskilful and negligent conduct of the defendant, said bones in said wrist and hand were not set, but were permitted to remain out of place for six weeks and three days, until it became impossible properly to set or cure them, whereby plaintiff is damaged in the sum of \$5,000.

A demurrer was filed to each paragraph of the amended complaint, which was overruled, and exceptions given to appellant. The cause was then put at issue by an answer in general denial, and a separate answer of the two-year statute of limitations given to each paragraph. The cause was tried by a jury, and a verdict of \$1,000 for appellee returned with answers to interrogatories. A motion for a new trial was overruled, and a judgment for \$1,000 was rendered on the verdict, from which appellant prayed an appeal to this court. The only error assigned that is argued by counsel is the overruling of the motion for new trial.

The first ground of this motion relates to the admission of evidence. On cross-examination appellant was asked the following question: "Doctor, did you convey your

1. real estate to your wife after this suit was brought, or just before?" Over the objection of appellant, the doctor was permitted to answer the question, "Yes." Appellant's counsel insists that this was error; that the evidence had no relation to any issue in the case, and especially that it was not admissible on cross-examination, because there was no examination of the witness on this subject in his examination-in-chief. As an independent fact, this conveyance by appellant of his real estate to his wife is foreign to any issue in the case, and it could be competent and material, if at all, but for one purpose, viz.: It might disclose inculpatory facts and circumstances, or an admission, by way of acts and conduct, proper to be submitted to a jury, as tending to show that appellant was conscious of having

failed and neglected to treat appellee's injured arm in that skilful and careful manner that the law requires, and that he feared that he might be required to respond in damages on account of such neglect and lack of skill. We assume that it was on this theory that the trial court admitted the evidence. Appellant testified that he treated the broken wrist, and, in effect, denied any act of omission or commission that in any way tended to show any lack of professional skill, care or attention, but said that he did everything that a careful, attentive and skilful surgeon would have done under the same circumstances. This being the effect of appellant's testimony, it was proper, on cross-examination, for appellee to elicit from appellant any admission, by way of words or conduct, that tended to contradict, destroy, weaken or discredit his said evidence-in-chief, and we think the admission, elicited by the question objected to, tended to have this effect; therefore, the evidence, if competent at all, was proper on cross-examination.

There seems to be some conflict in the authorities in different states as to the admissibility of this character of evidence, but we think the weight of authority favors its admission. In the case of *Myers v. Moore* (1891), 3 Ind. App. 226, this court said at page 231: "The appellant testified in his own behalf, and over his objection was asked upon cross-examination, and required to answer, about the disposition made by him of his property, after the commission of the alleged assault and battery. This examination was competent for one purpose. It might disclose inculpatory facts and circumstances proper to be submitted to the jury. It might throw light upon the quality of the acts charged against the appellant in the complaint. It is upon this principle, or theory, that evidence of flight, escape, disguise, concealment and the like, may properly be considered in determining the guilt or innocence of the accused in a criminal case. Its weight would be a question for the jury. If the appellant wanted to avoid an improper application by

the jury of this evidence, he should have prepared a charge upon that subject and requested the court to give it.”

It is said in 2 Wharton, Evidence (3d ed.) §1081: “Admission may be by acts as well as by words. Silence itself may, as we shall soon more fully see, under certain circumstances be proved as involving an admission; and *a fortiori* may such acts as are tantamount to an admission in words.” To the same effect is the case of *Parker v. Montieth* (1879), 7 Or. 277. See, also, 1 Greenleaf, Evidence (15th ed.) §170. In the case of *Heneky v. Smith* (1882), 10 Or. 349, 45 Am. Rep. 143, a deed had been admitted in evidence by the lower court, showing a conveyance by defendant of several parcels of real estate, the consideration for which was \$12,000. This deed was executed fourteen days after a shooting had occurred, and six days after the action was commenced and the summons served. The admission of this evidence was also duly objected to, and an exception taken to the ruling of the court permitting it to go to the jury. In discussing the case the supreme court said: “In view of its character and the circumstances under which it was executed, we think it was properly admitted. The jury might reasonably infer from this act of the appellant, in view of all its surroundings, that it was prompted by a consciousness on his part, that the shooting of the respondent was unjustifiable, and that he was legally liable for the damages occasioned by it. In this view, it would operate like an admission of liability, and be equally competent. ‘Admissions may be by acts, as well as by words.’ 2 Wharton, Evidence [2d ed.] §1081; *Pennsylvania R. Co. v. Henderson* [1865], 51 Pa. St. 315.” In 1 Wigmore, Evidence §282, the following language is used: “The conveyance of property, during litigation or just prior to it, may be evidence of the transferor’s consciousness that he ought to lose.”

Counsel for appellant insist that in this State the most recent case upon this subject is that of *Miller v. Dill* (1898), 149 Ind. 326, which, they say, is directly in point, and an

authority against the admission of this evidence. We do not so construe it. In that case, plaintiffs brought suit to cancel some promissory notes, claiming they were forgeries. One of the plaintiffs testified in his own behalf, and on cross-examination was asked if he then owned property, and if he had conveyed property held by him at the time of the alleged execution of the notes, to which questions the court sustained objections, and the court said in reference thereto: "It is claimed that these questions would have elicited the information that the witness had conveyed property held by him at the time of the alleged execution of the notes, and that he had no property at the time of the examination. The inferences sought to be drawn were that the conveyance was fraudulent, having been intended to defeat these notes, and therefore an act inconsistent with the evidence of the witness that he had not executed the notes, and had no knowledge of their existence. Whatever the legitimate inference from a fraudulent or voluntary conveyance, there can be no inference from the mere conveyance of one's property that he is a debtor, or that he does so to defeat a claim the validity of which he denies."

It will be seen that the facts in that case were entirely different from those in the case at bar. It was plaintiff, and not defendant, who was asked the question, and the same inference was not warranted in the offered evidence in that case that would be warranted in this case. In that case the only questions asked were if he (the plaintiff) then owned property, and if he had conveyed property held by him at the time of the alleged execution of the notes. There was no offer to follow these questions with other questions and answers, showing that the conveyance was fraudulent. If the harm, that appellant insists probably resulted, came from said questions, it must have been due to the silence of appellant, and the want of an explanation by him of the facts and circumstances connected with the conveyance. This the appellant could have prevented by such ex-

planation, if, in fact, the conveyance was *bona fide*, and was not made on account of a consciousness of his own inculpatory acts. After these questions and answers, appellant was entitled, on a redirect examination, to a full explanation and statement of all the facts and circumstances of the conveyance, to the end that the jury might draw no improper inference from the admitted evidence. Appellant also had the further protection that the law affords, of defining the application and purpose of the admitted evidence, by tendering an instruction thereon. *Myers v. Moore, supra*; *Marks v. Jacobs* (1881), 76 Ind. 216; *Pittsburgh, etc., R. Co. v. Noel* (1881), 77 Ind. 110.

Appellant's counsel insist that numerous personal injury cases, where the court refused to admit evidence of changes in, and repairs to, machinery, after the accident, are

2. controlling on this question. We think such cases are in point, but that, instead of supporting appellant's position, they, by inference at least, contradict it. An examination of those cases which hold that you may not, in a personal injury case, introduce evidence of repairs or changes made in the machinery or appliances after the injury, for the purpose of proving an admission on the part of the defendant that he had been a wrongdoer, will disclose that they all recognize the general rule that such acts or conduct are competent as evidence of admission, but these cases are excepted from the rule as a matter of public policy, and because great harm would result in such cases from the observance of the rule, and good would follow from its abrogation. The theory upon which these cases are put, among the exceptions to the rule, is that men should be encouraged to profit by their experience, and apply the knowledge thus obtained. In the case of *Terre Haute, etc., R. Co. v. Clem* (1890), 123 Ind. 15, 19, 7 L. R. A. 588, 18 Am. St. 303, the Supreme Court said: "True policy and sound reason require that men should be encouraged to improve, or repair, and not be deterred from it by the fear that if they

do so their acts will be construed into an admission that they had been wrongdoers.” In 1 Wigmore, Evidence §283, it is said: “That argument is that the admission of such acts, even though theoretically not plainly improper, would discourage all owners, even those who had genuinely been careful, from improving the place or thing that had caused the injury, because they would fear the evidential use of such acts to their disadvantage; and thus not only would careful owners refrain from improvements, but even careless ones, who might have deserved to have the evidence adduced against them, would by refraining from improvements subject innocent persons to the risk of the recurrence of the injury.” We are of the opinion that no error was committed by the admission of this evidence.

Propositions three, four, five, six and seven each relates to the admission of evidence, and call in question certain rulings of the court relative thereto. In the testimony 3. of appellee’s witness—Doctor Barnett—the first ruling complained of is presented by the following question and answer: “Q. Doctor, upon your examination of Mrs. Bisson’s left arm, wrist and hand, you may state whether or not, from your examination thereof, it is held in the same position as it was when it was splinted. A. I think the hand and the bones are in the same relationship that they were at the time it was dressed; that is my opinion.” The objection to this question was that the witness was not asked to state any facts upon which his opinion was based. The question does not, by its express terms, require the witness to base his opinion on the facts which he had detailed to the jury, and in this respect the question is subject to the objection urged by counsel. *Burns v. Barenfield* (1882), 84 Ind. 43, 47; *Sauntman v. Maxwell* (1900), 154 Ind. 114; *Bedford Belt R. Co. v. Palmer* (1896), 16 Ind. App. 17, 19. But an investigation of the record discloses that the witness had, before this question was put to him, testified as to his examination of the injured wrist and hand,

and had detailed the conditions which he found. We think, therefore, that while it is true that the question itself does not limit the doctor's opinion to the facts which he had before detailed to the jury, yet it may be fairly presumed that the answer was based upon such facts.

Section 407 Burns 1908, §398 R. S. 1881, provides as follows: "The court must, in every stage of the action, disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party; and no judgment can be reversed or affected by reason of such error or defect." Section 700 Burns 1908, §658 R. S. 1881, provides in part as follows: "Nor shall any judgment be stayed or reversed, in whole or in part, where it shall appear to the court that the merits of the cause have been fairly tried and determined in the court below."

The purpose of these two sections, if they are to be given any force or effect at all, is to prevent the reversal of a case for an alleged error of the kind now under discussion, where an examination of the record itself convinces the court that no prejudice resulted to the complaining party from the error complained of, and that no different result would have been reached if the error had not been committed. The force and effect of these two sections of the statute, and their controlling influence, have so often been recognized and declared by the Supreme Court and by this court, that we deem the citation of authority thereon unnecessary. There can be no doubt that the substance of the matter inquired about in the question complained of was proper, and that the question could have been so framed as to comply with the requirements of the law which appellant insists was disregarded. If the question had been so amended, we feel safe in saying that the same information, and probably the identical answer, would have been elicited. In such case, this court will treat the error as harmless.

Propositions four, five, six and seven relate to the admission of evidence, and the objections to this evidence are practically the same as those stated with reference to proposition three. In said objections there is less reason for counsel's contention than there was in the case of proposition three, and what we have said in connection with proposition three applies with equal or greater force to the objections presented by propositions four, five, six and seven.

Counsel next discuss proposition eight, which is as follows: "The court erred in giving to the jury instruction two, asked for by appellee." The language of the

5. instruction objected to is as follows: "And if you find from all the evidence in this case that plaintiff has proved the material allegations of any of the three paragraphs of her complaint, by a preponderance of the evidence, then you may find for the plaintiff." The language of this instruction is that the jury "may" find for the plaintiff, and not that they "must" so find. The purpose of this part of the instruction was to advise the jury merely that to entitle plaintiff to a recovery she was not required to prove the material allegations of all of the paragraphs of her complaint, but that the proof of the material allegations of any one paragraph was sufficient. No single instruction is required to contain all the law applicable to the case; but if it is correct as to the statement of the law, with reference to the matter upon which it purports to advise the jury, it is sufficient. *Louisville, etc., R. Co. v. Jones* (1886), 108 Ind. 551, 570; *Hamilton v. Love* (1899), 152 Ind. 641, 71 Am. St. 384; *Sievers v. Peters, etc., Lumber Co.* (1898), 151 Ind. 642. The language of the instruction clearly indicated to the jury that it might find for the plaintiff, subject to the condition and rules of law announced in the other instructions given; and, when taken in connection with the other instructions, we do not think that the jury could have been misled by the language of this instruction, and that no harm could have resulted from giving it. But no error could

be predicated on the giving of this instruction that would entitle appellant to a new trial in any event, because an examination of the record makes certain the fact that no harm resulted from the giving thereof.

There were 110 interrogatories answered by the jury, and these answers find conclusively that appellee was free from contributory negligence. They further find that appellant, in attempting to set the bones of appellee's fractured wrist and hand, never got the bones in position, but they were left as appellant found them immediately after the accident. These answers conclusively show that appellee's injuries were caused wholly by appellant's negligence, and that appellee in nowise contributed thereto. Where the answers to interrogatories show conclusively that no harm resulted from the giving of an instruction, the giving thereof, though erroneous, will not be ground for a new trial. *Indianapolis St. R. Co. v. Hockett* (1903), 159 Ind. 677; *Ellis v. City of Hammond* (1901), 157 Ind. 267.

Proposition nine relates to instruction nine. The same objection is urged to this instruction that was urged to the second, and what we have heretofore said applies with equal force to this instruction; and we might add, that the objection to instruction nine is without merit, because it expressly provides that plaintiff must be without fault before she is entitled to recover.

Counsel object to instruction five, asked for by appellee, and quote as the objectionable feature of the instruction the following language: "The burden of proving contributory negligence is on defendant, Morse Harrod, and, unless he has shown the same by a preponderance of the evidence, your finding as to this question should be for the plaintiff." Counsel then added: "It was not necessary for appellant to show by *his* evidence that there was contributory negligence on the part of appellee." (Our italics.) We might add that the instruction does not say that it was necessary for appellant to show by his evidence.

etc., but what we have said regarding the answers to interrogatories, disposes of the objections to this instruction, and renders the error, if any, unavailing on appeal.

Objection is urged also to instruction four. Counsel insist that it authorized the jury to take into account, in estimating damages, the worry and annoyance of appel-

7. lee, in contemplating her maimed condition. There is no doubt that counsel for appellant are supported by the weight of authority in their contention that any annoyance, worry or mental pain resulting solely from the contemplation of a maimed member of the body, and the humiliation of going through life in such a crippled condition, is too remote to be considered as an element of damage. *Maynard v. Oregon R. Co.* (1904), 46 Or. 15, 78 Pac. 983, 68 L. R. A. 477; *Lake St. Elevated R. Co. v. Gormley* (1903), 108 Ill. App. 59; *Chicago City R. Co. v. Anderson* (1899), 182 Ill. 298, 55 N. E. 366; *Southern Pac. Co. v. Hetzer* (1905), 135 Fed. 277, 68 C. C. A. 26, 1 L. R. A. (N. S.) 288. It is well settled in Indiana that personal disfigurement or deformity, resulting from negligent injury, is a proper element to be considered in estimating damages, and such "anxiety and distress of mind, as are fairly and reasonably the plain consequences of the injury complained of," are proper elements of damage. *Pittsburgh, etc., R. Co. v. Montgomery* (1898), 152 Ind. 1, 69 L. R. A. 875, 71 Am. St. 301; *Taber v. Hutson* (1854), 5 Ind. 322, 61 Am. Dec. 96; *Cox v. Vanderkleed* (1863), 21 Ind. 164; *Fisher v. Hamilton* (1874), 49 Ind. 341. In the case of *Southern Pac. Co. v. Hetzer, supra*, at page 274, the court said: "The rule which has been adopted by this court, however, and the rule which seems to us the better one, is that in actions for personal injury the plaintiff may recover for the bodily suffering and the mental pain which are inseparable and which necessarily and inevitably result from the injury. But mortification or distress of mind from the contemplation of the crippled condition and of its effect upon the esteem of his

fellows, that mental pain which is separable from the physical suffering caused by the injury, is too remote, indefinite, and intangible to constitute an element of the damages in such a case, and evidence of it is inadmissible.”

Under the authorities cited, it was entirely proper that the jury, in estimating the damages in this case, should take into account any personal defect resulting to ap-

8. pellee from her injuries, and it was proper, also, that it consider any mental pain, suffering, worry or anxiety experienced by appellee in the actual use of the injured wrist and hand that was the direct result of the maimed condition, and we think it was in this sense that the instruction complained of authorized the jury to take into account such elements of “worry” and “anxiety,” and not that the jury should consider any “anxiety” or “worry” resulting from the humiliation that came from the contemplation of the maimed condition. While the instruction is not carefully drawn in this regard, we think the meaning we have given it is evidently the one intended by the court and accepted by the jury. It is evident from the answers to the interrogatories and the amount of the verdict that the jury was not misled by the instruction. Appellant tendered twenty-nine instructions, all of which were given to the jury, and, taking the instructions as a whole, the law of the case was stated as favorably to appellant as the authorities warrant, and no harm resulted to him from instructions given in the case.

Counsel next insist that the evidence shows that “the cause of action relied on by appellee arose more than two years before the filing of the amended complaint.”

9. If the original complaint is based upon tort, and not upon contract, there is nothing in this objection, because it is conceded that the original complaint was filed before the two years expired; but it is insisted that it was predicated upon contract, and that the amended complaint,

being predicated upon tort, was, in effect, a new action, and did not relate back to the time of filing the original complaint. We have examined the original complaint with care, and are clearly of the opinion that counsel's assumption that this complaint is predicated upon contract is not warranted by the facts. The allegations are entirely different from those of the cases cited and relied on by appellant. There is no allegation of a promise on the part of appellant, and the mere fact that appellee alleges that she employed appellant for a certain reward is not controlling, where the other averments of the complaint conclusively show that recovery is sought for injury and damages resulting from the careless, negligent and unskilful treatment by appellant. We are of the opinion that the original complaint was based upon tort and not upon contract. This opinion is supported by the following authorities: *Goble v. Dillon* (1882), 86 Ind. 327, 44 Am. Rep. 308; *Boor v. Lowrey* (1885), 103 Ind. 468, 53 Am. Rep. 519; *DeHart v. Haun* (1890), 126 Ind. 378. The original complaint being based upon tort, the amended complaint unquestionably related back to the time of the filing of the original, which is conceded to be before the expiration of the two years.

We have examined the questions presented and argued by appellant in his brief, and find no error authorizing the granting of a new trial.

Judgment affirmed.

GREGORY, ADMINISTRATRIX, v. ARMS.

[No. 7,932. Filed November 1, 1911.]

1. **VENDOR AND PURCHASER.—Liens.—Purchase of Land Subject to.—Presumptions.—Suretyship.**—One taking a deed "subject to all liens," does not become personally liable to pay such liens; but the land thereafter constitutes the primary fund from which such liens are to be paid, the presumption being that the amount of the liens was deducted from the purchase price. p. 567.

2. **VENDOR AND PURCHASER.—Liens.—Agreements to Pay.—Liability.**—A purchaser who accepts a deed containing a promise to pay existing liens becomes personally liable for the payment of such liens. p. 568.
3. **VENDOR AND PURCHASER.—Assumption of Payment of Liens.—Suretyship.**—Where a purchaser buys land encumbered by a mortgage, agreeing to pay such mortgage, the mortgagee, unless he has assented to such arrangement, may treat both the mortgagor and the purchaser as principal debtors; but the land constitutes the primary fund for the payment of the mortgage, and a personal judgment for the residue only may be taken. p. 568.
4. **VENDOR AND PURCHASER.—Covenants in Prior Deeds.—Effect.—Presumptions.**—A purchaser is bound by the terms of covenants contained in prior deeds to the lands purchased; and he is presumed to know thereof. p. 569.
5. **VENDOR AND PURCHASER.—Covenants in Prior Deeds.—Effect.**—A purchaser whose vendor agreed in his deed to accept the deed to the land in question, "subject to all liens," is bound thereby, though no mention is made in his deed of one of such liens. p. 569.
6. **SUBROGATION.—Sureties.—Vendor and Purchaser.—Liens.**—If a mortgagor is primarily liable for the payment of his mortgage, he cannot be subrogated to the rights of the mortgagee; but where he has conveyed the land to a grantee who has agreed to pay the lien, such mortgagor is subrogated, upon payment of the mortgage, to the rights of the mortgagee in the enforcement of the lien against the land. p. 569.
7. **VENDOR AND PURCHASER.—Prior Liens.—Assumption of Payment of.—Evidence.**—Where the deed of a grantee's remote grantor provided that the land was sold for a consideration of \$1, and "subject to all liens," the stated consideration for the deed to the grantee, made on the same day, being \$5,000, an existing lien thereon for \$3,500 being specifically assumed as a part of the purchase price in such last deed, such facts tend to show that an existing mortgage for \$500 was assumed by the grantee of such remote grantor. p. 570.
8. **VENDOR AND PURCHASER.—Liens.—Specific Mention of One and Omission of Another.—Evidence.**—A deed conveying land encumbered by two mortgages, specifically naming one to be assumed for payment by the purchaser, tends to show that such vendor considered himself liable as a principal for the payment of the other mortgage for which he was liable under the provisions of his deed. p. 571.
9. **VENDOR AND PURCHASER.—Recorded Deeds.—Liens.—Notice.**—A deed duly recorded containing a provision that the land is conveyed "subject to all liens," constitutes notice thereof to all

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subsequent purchasers, and is binding upon them making such land the primary source of funds for the payment of such liens. p. 571.

10. **SUBROGATION.—Vendor and Purchaser.—Liens.—Deeds.—Principal and Surety.—Answer.**—In a suit by the personal representative of defendant's remote grantor, to recover the amount of a lien upon defendant's land paid by such representative, an answer that such lien constituted the individual debt of decedent, that it continued his debt until his death, and that the debt was fully paid by such representative before the bringing of the suit, is insufficient where the complaint alleged that the deed from decedent was executed "subject to all liens," of which the lien in question was one, such answer failing to show that decedent was primarily liable as a principal. p. 571.
11. **SUBROGATION.—Vendor and Purchaser.—Liens.—Deeds.—Answer.—Evidence.**—In a suit by a remote grantor's personal representative to recover the amount of a lien upon defendant's real estate, paid by such representative, an answer that such decedent as a part consideration for his conveyance to the defendant's grantor orally agreed to pay such lien, and that he and the plaintiff subsequently paid it, is sufficient, though there was a provision in the deed from decedent that the land was conveyed "subject to all liens," oral evidence being admissible to show the real consideration. p. 572.
12. **VENDOR AND PURCHASER.—Liens.—Payment.—Consideration.**—A vendor who had mortgaged his land, afterwards conveying it, orally agreeing to pay such mortgage, is not a surety in the payment of the mortgage, but a principal; and the consideration for his original mortgage is sufficient to support the subsequent agreement to pay such mortgage, where he and his grantee mutually agree in determining the purchase price that the mortgage shall be paid by such vendor. p. 574.
13. **SUBROGATION.—Vendor and Purchaser.—Liens.—Forbearance to Sue.—Consideration.—Answer.**—In a suit by the personal representative of a remote vendor for subrogation to the rights of a mortgagee of defendant's lands, the complaint alleging that such remote vendor's deed contained a provision that the land was conveyed "subject to all liens," an answer that the defendant accepted his deed upon the representation that the specific mortgage assumed was the only lien against the land, that he believed such representation, being ignorant of another mortgage thereon, that when he learned of the other mortgage he called upon such remote vendor and threatened to institute an action against defendant's vendor, that as a settlement thereof such remote vendor agreed to pay such mortgage, and that pursuant thereto, he paid interest thereon, and after his death, his admin-

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istratrix paid it, is sufficient, such agreement being supported by a consideration, since he might have become liable, having acknowledged that he was primarily liable for the debt. pp. 574, 577.

14. **FRAUDS, STATUTE OF.**—*Contracts.*—*Surety.*—*Vendor and Purchaser.*—Where a mortgagor conveys the lands in question "subject to all liens," and his grantee conveys such lands to the defendant, making no mention of the mortgage in question, such mortgagor's promise to the defendant to pay such mortgage is not a promise to pay the debt of another, and, therefore, is not within the statute of frauds. pp. 575, 577.
15. **CONTRACTS.**—*Consideration.*—*Value of.*—Where parties agree to a consideration of indeterminate value for their contract, the courts will uphold the contract. p. 575.
16. **SUBROGATION.**—*Vendor and Purchaser.*—*Liens.*—*Agreements to Pay.*—*Consideration.*—*Answer.*—Where a mortgagor conveys the mortgaged lands "subject to all liens," and his grantee conveys without mentioning such mortgage in his deed and such mortgagor and his personal representative are compelled to pay such mortgage, an answer, in a suit by such representative for subrogation to the rights of the mortgagee, that the defendant demanded that such mortgagor pay the debt, that he was financially embarrassed and could not pay it, but promised that if time for payment were extended by the mortgagee—the State of Indiana—he would pay it, and that defendant granted such extension, is bad, since the defendant was powerless to grant such an extension. p. 577.
17. **PLEADING.**—*Overruling Demurrer to Insufficient Paragraph of Answer.*—*Appeal.*—The overruling of a demurrer to an insufficient paragraph of answer constitutes reversible error, where the finding for defendant was general; and the court on appeal will not examine the evidence to determine whether such ruling was harmless. *McFadden v. Schroeder*, 9 Ind. App. 49, overruled. pp. 577, 578, 582.
18. **APPEAL.**—*Harmless Error.*—Where an error is shown affirmatively to have been harmless, the judgment will not be disturbed. pp. 578, 581.

From Warren Circuit Court; *James T. Saunderson*, Judge.

Suit by Lila F. Gregory, as administratrix of the estate of John Gregory, deceased, against Azro A. Arms. From a judgment for defendant, plaintiff appeals. *Reversed.*

Victor H. Ringer and *Edwin F. McCabe*, for appellant.

William B. Durborrow, for appellee.

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FELT, P. J.—Suit by appellant against appellee, for subrogation to the rights of the State of Indiana under a school-land mortgage executed by appellant's decedent, John Gregory, and to enforce the lien thereof against the real estate described therein and owned by appellee.

Omitting the formal parts of the complaint, it, in substance, alleges that on April 12, 1884, John, Hannah E. and Benjamin R. Gregory were the owners in fee simple, as tenants in common, of eighty acres of real estate in Warren county, Indiana; that on November 29, 1884, said John Gregory executed to the State of Indiana his note for \$500, due on or before December 1, 1889; that, to secure said note, all the aforesaid owners of said real estate duly executed a mortgage thereon to the State of Indiana; that it was duly recorded within the time required by the law; that on November 25, 1889, said John Gregory, his wife Lila joining him, and Hannah Gregory, by deed of general warranty, duly executed, conveyed to said Benjamin R. Gregory "for the sum of \$1," the undivided two-thirds part of 200 acres of real estate in said county, including the 80 acres so mortgaged as aforesaid; that said conveyance was made subject to all liens and charges now existing thereon, and especially subject to a mortgage for \$3,500, due to William C. Smith, which mortgage said Benjamin R. Gregory agreed to pay; that said deed was duly accepted by the grantee, and duly recorded on November 26, 1889, in the recorder's office of said Warren county; that on November 25, 1889, said Benjamin R. Gregory and wife, by warranty deed, duly executed, conveyed said real estate, including the 80 acres aforesaid, to appellee, for a consideration of \$5,000, and the deed was duly recorded within the time allowed by law; that on December 2, 1896, said Benjamin R. Gregory died, and his estate has not been administered on; that on November 7, 1908, John Gregory, appellant's decedent, died; that the auditor of said county, on July 21, 1909, filed a verified claim against the estate of said John Gregory, deceased, for

the collection of said note for \$500, which claim was disallowed by the administratrix; that upon a trial on March 17, 1910, said claim was allowed by the court in the sum of \$682.50, which amount appellant paid, and thereafter instituted this suit.

Appellee answered by a general denial, and by several paragraphs of affirmative answer, to the sixth, seventh, eighth and ninth of which demurrers were overruled, and the rulings thereon are here assigned as errors; also the overruling of appellant's motion for a new trial.

The first question arising under the assignment of errors relates to the legal effect of the language employed in the deed from John Gregory and others to Benjamin R. Gregory.

The mortgage for \$3,500, especially mentioned, seems to have covered all the 200 acres conveyed by the deed, but was junior to the mortgage for \$500, to the State of Indiana, on the 80 acres included in the conveyance; but the latter mortgage was not mentioned in the deed, except as it was covered by the general clause, "subject to all liens," etc.

The position of appellee is that since the note for \$500, was the individual obligation of John Gregory, the conveyance by him to Benjamin R. Gregory, subject to existing liens, did not change the character of his obligation, but he was, after as well as before the execution of the deed, primarily liable for the debt as principal.

The contention of appellant is that such conveyance, *ipso facto*, made the real estate the primary source of funds for the payment of the mortgage debt, and that John Gregory thereafter occupied the position of surety, instead of principal, as originally, and up to the time of the conveyance, and that appellee, as grantee of Benjamin R. Gregory, took the real estate charged with such primary liability for the payment of the mortgage.

Where a person takes a deed to real estate subject to encumbrances thereon, he does not thereby become personally liable to discharge the preëxisting liens, but, in the absence

of any showing to the contrary, the purchaser is deemed to have deducted the amount of the prior encumbrances from the purchase price, and the land in his hands becomes the primary source of funds out of which the encumbrances are to be paid. *State, ex rel., v. Davis* (1884), 96 Ind. 539; *Bunch v. Grave* (1887), 111 Ind. 351, 355; *Atherton v. Toney* (1873), 43 Ind. 211, 213; *Hancock v. Wiggins* (1902), 28 Ind. App. 449; *Burns v. Gavin* (1889), 118 Ind. 320, 322; *Myers v. O'Neal* (1892), 130 Ind. 370, 373; *Green v. McCord* (1903), 30 Ind. App. 470; *Kostenbader v. Spotts* (1876), 80 Pa. St. 430, 433; *Gerdine v. Menage* (1889), 41 Minn. 417, 420; *Drury v. Holden* (1887), 121 Ill. 130, 137; *Manwaring v. Powell* (1879), 40 Mich. 371, 374.

While one who accepts a deed conveying to him real estate subject to a mortgage does not thereby render himself personally liable for the payment of the debt, yet

2. if the purchaser assumes the payment of the mortgage debt he thereby makes himself personally liable. In both instances, however, the purchaser takes the land charged with the payment of the debt, and it remains the primary source of funds for the payment of the mortgage as between the purchaser and the mortgagee.

If the purchaser assumes the mortgage, he becomes, as to the mortgagor, the principal debtor, and the mortgagor becomes the surety; but the mortgagee, unless he has as-

3. sented to such an arrangement may treat both as principal debtors, and may take a personal judgment against each of them in addition to his decree of foreclosure. If, however, the conveyance is made subject to the mortgage, upon foreclosure the purchaser of the land, while not liable personally, cannot prevent the real estate from being first exhausted to pay the mortgage debt, and the mortgagor will only be liable on the personal judgment against him for the amount, if any, remaining due on the judgment after the real estate has been exhausted. *Hancock v. Fleming* (1885), 103 Ind. 533; *Adams v. Wheeler*

(1890), 122 Ind. 251, 253; *Stuckman v. Roose* (1897), 147 Ind. 402, 407; *Baltes Land, etc., Co. v. Sutton* (1900), 25 Ind. App. 695; *Oglebay v. Todd* (1906), 166 Ind. 250; *State, ex rel., v. Davis* (1884), 96 Ind. 539; Sheldon, Subrogation (2d ed.) §§11, 26, 85; 1 Jones, Mortgages (6th ed.) §§736, 738, 741; *Cherry v. Monro* (1848), 2 Barb. Ch. (N. Y.) 618; *Hopkins v. Wolley* (1880), 81 N. Y. 77; *Wilbur v. Warren's Estate* (1887), 104 N. Y. 192, 197; *Calvo v. Davies* (1878), 73 N. Y. 211, 29 Am. Rep. 130; *Johnson v. Thompson* (1880), 129 Mass. 398; *Hermanns v. Fanning* (1890), 151 Mass. 1, 23 N. E. 493; *Moore's Appeal* (1879), 88 Pa. St. 450, 452, 32 Am. Rep. 469.

The deed to appellee contained no provision referring to encumbrances, except as to the mortgage for \$3,500; but

a purchaser is bound by the recitals in the prior
 4. deeds, which constitute his chain of title, and he is presumed to have examined the records of deeds, necessary to make out such a chain of title. *Oglebay v. Todd, supra*; *Lowry v. Smith* (1884), 97 Ind. 466; *Bran-non v. May* (1873), 42 Ind. 92; 1 Jones, Mortgages (6th ed.) §740.

On the foregoing authority, it is clear that appellee is bound by the clause in the deed from John Gregory and

others to Benjamin R. Gregory, his immediate grant-
 5. or, relative to existing liens, though the deed to ap-
 pellee was not made subject to any lien or encum-
 brance, except the mortgage for \$3,500.

If appellant, as the legal representative of John Gregory, deceased, in paying the debt evidenced by the note and mort-

gage in controversy, discharged an obligation for

6. which decedent was primarily liable, there can be
 no subrogation. If, however, decedent was only sec-
 ondarily liable as surety, and appellant paid the debt after
 due allowance and adjudication by the court, the payment
 was not voluntary, and appellant's right of subrogation was
 made out, and the enforcement of the lien of the school-

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fund mortgage against appellee's real estate would be fully warranted. *Warford v. Hankins* (1898), 150 Ind. 489; *Begein v. Brehm* (1890), 123 Ind. 160, 166; *Josselyn v. Edwards* (1877), 57 Ind. 212; *Rardin v. Walpole* (1871), 38 Ind. 146; Sheldon, Subrogation (2d ed.) §§11, 26; 1 Jones, Mortgages (6th ed.) §§740, 741.

The foregoing propositions enter largely into the consideration of the questions arising on the demurrers to the several paragraphs of special answer. In determining the sufficiency of the answers, it is necessary to keep in view the peculiar provisions of the deed from John Gregory and others to Benjamin R. Gregory, and the facts disclosed by the complaint.

The note for \$500 was executed by John Gregory alone, but the mortgage securing it was executed on eighty acres of real estate owned jointly by the maker of the note, Benjamin R. Gregory and Hannah E. Gregory. The note, by its terms, was due December 1, 1889, and on November 25, 1889, John Gregory and wife and Hannah E. Gregory conveyed to Benjamin R. Gregory their undivided two-thirds interest in 200 acres of real estate, including the aforesaid 80 acres, for a named consideration of \$1, "subject to all liens and charges" existing thereon, and provided that such land was especially subject to a mortgage for \$3,500, which, by the terms of the deed, the grantee agreed to pay.

On the same day, Benjamin R. Gregory, by warranty deed, conveyed the same real estate to appellee, for a consideration of \$5,000, subject only to the mortgage for \$3,500.

The named consideration of \$1 in the deed from John Gregory and others tends to support the proposition that it was intended that the land should be primarily liable for all encumbrances thereon, including the mortgage for \$500. This is to some extent supported by the fact that on the same day Benjamin R. Gregory conveyed the real estate to appellee for \$5,000, subject only to the mortgage for \$3,500,

thus showing an apparent difference of \$1,500 in the consideration of the two deeds. On the other hand, the following undisputed facts tend to support the proposition

8 that the grantor, John Gregory, at the time of and subsequent to the conveyance by him, remained primarily liable for the mortgage for \$500: The provision requiring the grantee to pay \$3,500; the failure specifically to mention the smaller mortgage and to provide for its payment; the fact that originally he alone executed the note, while others joined in a mortgage upon their joint property for its security, and the fact that the deed from John Gregory and others was for their individual two-thirds interest in 200 acres of real estate to the owner of the other moiety, which conveyance included the 80 acres covered by the mortgage for \$500.

However, in these observations, we are not to lose sight of the fundamental proposition that a conveyance subject to existing liens, where the deeds are duly recorded

9. within the time provided by law, charges the grantee with notice of all that is shown by the record, including the recitals in the deeds, and that such conveyance makes the real estate the primary source of funds for the payment and satisfaction of such encumbrance.

The sixth paragraph of answer admits the execution of the note and mortgage as alleged, but avers that at the time of the execution of the note the debt was the individual debt of appellant's decedent, and it continued

10. to be his individual debt until the date of his death; that the debt was fully paid by appellant before bringing this suit, and that such payment fully satisfied said mortgage. The principal objection urged against this paragraph is that the averment that the debt at all times remained the debt of decedent, John Gregory, is a mere conclusion of the pleader, unsupported by the averment of facts from which such conclusion can be drawn.

As already shown, the language of the deed—"subject to

all liens and charges now existing thereon''—is sufficient in law to make the real estate the primary source of funds for the payment of the mortgage for \$500, and to place John Gregory in the situation of surety as to that obligation, as against the land or appellee.

To constitute a good answer in this case, facts must be alleged that in some way meet or avoid the language of the deed, the effect of which is as before stated. The statement that the debt remained the individual debt of John Gregory after the execution of his deed, whether considered as a conclusion or as the averment of an ultimate fact, is insufficient to overcome the presumption that the grantee has reserved out of the consideration the amount of the mortgage. In any event, the obligation remained the individual debt of John Gregory until paid, the only effect of the deed being to change him from the position of principal to that of surety as against the grantee and the mortgaged premises. For failure to aver facts showing that John Gregory was primarily liable as principal after the execution of the deed, the sixth paragraph is insufficient as an answer to the complaint. *Weir v. State, ex rel.* (1903), 161 Ind. 435; *Davis v. Clements* (1897), 148 Ind. 605; *Grand Lodge, etc., v. Hall* (1903), 31 Ind. App. 107.

The general averments of the seventh, eighth and ninth paragraphs of answer are substantially the same.

The seventh paragraph admits the facts averred in the complaint as to the ownership and conveyance of the real estate, and the execution of the note and mortgage for 11. \$500. It is therein further averred that at and before the time of the conveyance of said real estate to Benjamin R. Gregory by John Gregory and others, "it was stipulated and agreed among and between them that the mortgage on said land as aforesaid, * * * and said note for \$500, executed individually by John Gregory to the State of Indiana, was to be, continue and remain the individual debt and liability of said John Gregory, and that

said note together with accrued and accruing interest, was to be paid to the State * * * by said John Gregory, and that said Benjamin R. Gregory and his subsequent grantees of said land were at all times to be protected from the lien of said mortgage and foreclosure thereof;" that, relying on said promise of John Gregory, said Benjamin R. Gregory accepted said deed as averred in the complaint; that, in pursuance of said agreement, said John Gregory, after the execution of said deed, made payments of interest on said mortgage as follows: December 10, 1890, \$40; April 15, 1892, \$40; December 3, 1898, \$237.34; February 27, 1903, \$30; February 17, 1905, \$60; December 18, 1906, \$60; that on December 23, 1910, appellant paid the full amount due on said mortgage; that appellee is, and has been since November 25, 1889, the owner and in possession of the afore-said real estate; that the indebtedness evidenced by said mortgage was at all times the debt of appellant's decedent, and of no other person, and the payment thereof, as alleged before the bringing of this suit, was in full satisfaction of said note and mortgage, and appellant should not be subrogated to the rights of the State thereunder. and should take nothing by reason of such payment.

The insufficiency of the seventh paragraph of answer is urged, on the ground that it is an attempt to vary or modify a written instrument by a parol agreement; that there is no consideration shown for the alleged promise of John Gregory to pay the debt, and that the alleged payments of interest were purely voluntary. The gist of this paragraph of answer is that at the time of the execution of the deed to Benjamin R. Gregory it was agreed by John Gregory that the note for \$500, signed by him alone, was to be his individual debt, that he would pay it in full, and cause the mortgage to be satisfied; that, in pursuance of such agreement, he did pay interest as therein set out, and after his death his administratrix paid the debt in full. This shows an agreement, at the time of the execution of the deed, re-

lating to the consideration, and it is the law, sustained by repeated decisions of our courts of last resort, that the real consideration may be shown by parol evidence, although different from that stated in the deed.

Where there is an agreement between the grantor and grantee, made at or before the time of the execution of the deed as to the payment of an encumbrance, though not expressed in the instrument, it may be proved by parol. *McDill v. Gunn* (1873), 43 Ind. 315, 319; *Pickett v. Green* (1889), 120 Ind. 584, 588; *Bever v. Bever* (1896), 144 Ind. 157, 162.

The consideration moving to John Gregory when he executed his note is sufficient to support his agreement to pay such mortgage; and if, as the answer shows, in agreeing upon the consideration for the conveyance of the real estate, it was mutually arranged that he should pay the note for which he was already liable, his payments of interest or principal, in pursuance of such an agreement, would not be voluntary, but in the discharge of an existing obligation.

The court did not err in overruling the demurrer to the seventh paragraph of answer.

The eighth paragraph of answer shows that at and before the time appellee accepted the deed from Benjamin R. Gregory, the latter represented to him that the land was clear of encumbrance, except the mortgage for \$3,500; that he relied upon these representations and believed them to be true, and did not know of the mortgage for \$500 until after he had accepted the deed for the land; that when he learned of the existence of the mortgage he demanded of John Gregory that he pay and discharge it; that said John Gregory then and there promised to pay the mortgage if appellee would not institute any suit against his brother, said Benjamin R. Gregory, for breach of his warranty or for fraud in the sale of said land, as the debt was his individual debt; that appellee relied upon said promise, and

forebore bringing any suits against Benjamin R. Gregory; that, in pursuance of said agreement, said John Gregory paid interest on said debt, and after his death it was paid in full by his administratrix.

It is urged that if the promise on the part of John Gregory was an agreement to pay the debt of another, and was not shown to be in writing, it is within the statute of frauds and void; that no consideration is shown, and the answer is not good as an estoppel, because all the facts were equally known to both parties.

While the effect of the conveyance by John Gregory to Benjamin R. Gregory was to make the land the primary source of funds out of which to pay the mortgage,

14. John Gregory remained liable as surety, as between himself and appellee or the land, but the mortgagee was at all times entitled to a personal judgment against him upon default of payment, and was not affected by the rights existing between the mortgagor and his immediate or remote grantee. John Gregory's promise to pay the mortgage debt, if appellee would refrain from bringing suit, was but a promise to pay a debt for which he was already liable. Such promise is not within the statute. *Lowe v. Hamilton* (1892), 132 Ind. 406, 409; *Lowe v. Turpie* (1897), 147 Ind. 652, 683, 37 L. R. A. 233; *McDill v. Gunn* (1873), 43 Ind. 315, 319; *Boruff v. Hudson* (1894), 138 Ind. 280, 283; *Wolke v. Fleming* (1885), 103 Ind. 105, 107, 53 Am. Rep. 495.

The question of want of consideration turns upon the sufficiency of appellee's alleged promise of forbearance and its performance. It is not alleged that suit was threat-

15. ened, or that appellee had paid or offered to pay the mortgage.

It appears from the pleading, however, that appellee accepted the deed, not knowing of the mortgage, relying upon representations of his grantor, who conveyed by statutory warranty deed; that the debt was the personal obligation of John Gregory, and that appellee's right of action, if not

complete, was within his own keeping, and could be made complete by payment of the mortgage; that, in addition to preventing suit against his brother, John Gregory had a personal interest in warding off litigation, as he might be brought into the controversy in some way, owing to his acknowledgment that he was primarily liable for the debt.

In 6 Am. and Eng. Ency. Law (2d ed.) 748, it is said: "Forbearance to sue upon any legal demand is a valuable consideration for a promise either by the party liable or by a third party." In the same volume it is said: "If both parties *bona fide* believe that the plaintiff's demand is just, his forbearance will be a valuable consideration." 6 Am. and Eng. Ency. Law (2d ed.) 742.

In the case of *Cornell v. Central Electric Co.* (1895), 61 Ill. App. 325, on page 327, it is said: "Nor is it material that the certain right to recover in the suit forborne should exist. If the right were honestly asserted, though a doubtful one, the agreement to forbear its prosecution is based upon a sufficient consideration." See, also, *Honeyman v. Jarvis* (1875), 79 Ill. 318; *Knotts v. Preble* (1869), 50 Ill. 226, 99 Am. Dec. 514.

Anything is a valuable consideration for a contract that is of advantage to the one or of disadvantage to the other. Where parties agree to a consideration of indeterminate value, the courts will not substitute their judgment for that of the parties, but will uphold the contract. *Ditmar v. West* (1893), 7 Ind. App. 637; *Donahoe v. Rich* (1891), 2 Ind. App. 540, 546; *Johnson v. Staley* (1894), 32 Ind. App. 628; *Coffin v. Trustees, etc.* (1883), 92 Ind. 337, 341; *Wills v. Ross* (1881), 77 Ind. 1, 40 Am. Rep. 279; *Giles v. Ackles* (1848), 9 Pa. St. 147, 49 Am. Dec. 551; *Pearsell Mfg. Co. v. Jeffreys* (1904), 183 Mo. 386, 81 S. W. 901, 105 Am. St. 496.

The agreement was not one required to be in writing, and was supported by a consideration recognized by the law as sufficient, and, as applied to this particular case, is strengthened by the averment that both parties acted on it for years;

the one by forbearance and the other by repeated payments of interest. The answer was sufficient to withstand the demurrer.

The sufficiency of the ninth paragraph of answer must be determined from the averments that show that when appellee demanded payment of the mortgage, John Gregory was financially embarrassed and unable to pay the debt; that he promised appellee that if he would grant him an extension of time he would pay the interest on the note as it accrued, and would pay the note in full and obtain a release of the mortgage; that appellee relied upon said agreement, and granted the extension for the benefit of said John Gregory, who paid the interest thereon.

The principal objections urged against this paragraph are that there was no contractual relation of any kind or character between John Gregory and appellee, the mortgagee being the State of Indiana; that appellee had no power to grant an extension of time for the payment of the debt; and that the alleged agreement is therefore a want of consideration. It is fundamental that a person must have it in his power to do the thing he undertakes to do to make his promise sufficient as a consideration. Appellee being powerless to grant an extension of time on the mortgage debt for the State of Indiana, the mortgagee, his alleged agreement to extend the time of payment was without consideration. The answer was therefore insufficient, and it was error to overrule the demurrer thereto.

The court made a general finding for defendant, and rendered judgment accordingly, from which plaintiff appealed.

The ruling on the demurrers to the sixth and ninth paragraphs of appellee's answer being erroneous, the question arises whether we may ascertain from the record that such errors were harmless. Has the court the right, or is it its duty, to look to the evidence to ascertain whether the overruling of the demurrer to an insufficient answer was harmless error?

Some apparent confusion exists in the decided cases, owing largely to a failure to observe the distinction between the sustaining of a demurrer to a good answer where there are other good paragraphs under which the same evidence is admissible, and such error on appeal is assigned by the answering defendant, and a case like this one, where the error consists in overruling demurrers to insufficient paragraphs of answer, and the judgment rests on a general finding for defendant.

In the case of *Norris v. Tice* (1895), 13 Ind App. 17, this court, by Reinhard, J., on page 21, said: "The decided cases establish the rule in this State that it is harmful error to overrule a demurrer to a bad paragraph of answer, even if the same facts could have been proved under another paragraph which is good. The ruling of the court upholding the bad pleading is a judicial declaration that the defense therein pleaded is sufficient to bar the action, if proved, and such a ruling is equivalent to the establishment of a theory unjustly cutting off the plaintiff from his rights. There is a marked difference between overruling a demurrer to a bad answer and sustaining a demurrer to a good answer, the failure to observe which has led to great confusion in the decisions."

It frequently has been stated in general terms that an error will be adjudged harmless, where it affirmatively
18. appears from the record that it resulted in no harm to the party against whom it was committed. Elliott, App. Proc. §637.

But this general rule does not necessarily mean that an appellate tribunal should, or may, examine the evidence to determine the effect on the complaining party
17. of the erroneous ruling.

In the case of *Ryan v. Hurley* (1889), 119 Ind. 115, 117, our Supreme Court, in discussing the question where there were several paragraphs of complaint, all held good below and part held to be insufficient on appeal, said: "The find-

ing of the court is general, and it cannot be determined from the finding whether it is based upon the good or bad paragraph. It repeatedly has been held by this court that we cannot look into the evidence and be governed by it in affirming or reversing a judgment for error committed in ruling on a demurrer to a complaint. The complaint must stand on its own merits, and if there is error in overruling a demurrer to it the case must be reversed. We cannot look into the evidence to determine whether injury did or did not result from such error. *Pennsylvania Co. v. Poor* [1885], 103 Ind. 553; *Pennsylvania Co. v. Marion* [1885], 104 Ind. 239; *Belt R., etc., Co. v. Mann* [1886], 107 Ind. 89.”

In the case of *Belt R., etc., Co. v. Mann, supra*, on page 91, Mitchell, J., said: “Where a verdict is based upon an entire complaint, which contains two or more paragraphs, if either paragraph is bad, the judgment will be reversed. * * * In such a case, the ruling must stand or fall upon its own merits. The evidence, or the result reached, cannot be considered in determining whether the complaint was sufficient.”

In the case of *Wilson v. Town of Monticello* (1882), 85 Ind. 10, on page 20, Elliott, J., said: “Where good answers are held bad on demurrer or are rejected on motion, the defendant is entitled to the benefit of the exception reserved upon that ruling, unless there are others entitling him to put in evidence substantially the same matters as are pleaded in the answers held bad or rejected. The evidence is not to be looked to for the purpose of discovering whether the ruling did or did not do him harm. Where a plea is struck down, the presumption is that the rule of law involved in the ruling was acted upon throughout the case, and the defendant is not bound to again present the question. An objection once well and fully presented, and properly and adequately reserved, does not need to be repeated at subsequent stages of the case. A defendant who receives the judgment of the court upon his answer may accept that ruling as the declara-

tion of the court that it would be useless to offer evidence under it, for if fully proved the defense set forth would not be allowed to prevail. Nor would it be just to a defendant, who has put in a valid plea, to hunt through the evidence to ascertain whether he was or was not injured, for he is entitled to the benefit of the explicit admission made by the demurrer."

In the case of *Fleetwood v. Brown* (1887), 109 Ind. 567, 573, Zollars, J., in discussing cases cited to sustain the contention that the evidence may be looked to to cure an error in ruling upon a demurrer to an answer, said: "It was not therein held, or intended to be held, that this court may look to the evidence to ascertain whether or not the sustaining of a demurrer to a good paragraph of an answer was a harmless error. It has never been so held by this court. On the contrary, the holding has been, that in such a case, the evidence is not to be looked to for the purpose of discovering whether the ruling did or did not do harm."

Aside from general statements, the only Indiana case that seems to hold that the evidence may be, and in some cases should be, examined, even when conflicting, to determine whether an erroneous ruling upon a demurrer was or was not harmful, is that of *McFadden v. Schroeder* (1894), 9 Ind. App. 49. In that case the plaintiff recovered an amount much smaller than he claimed, and on appeal assigned error of the court in overruling a demurrer to a paragraph of answer, which on appeal was held insufficient. It was held that the evidence admitted under the erroneous answer went to the question of the value of the goods, and that since the jury found the value to be much less than shown by this evidence, the court was warranted in holding the error, in overruling the demurrer to the bad answer, harmless.

In Elliott, App. Proc. §638, it is said: "It is possible that where there is absolutely no conflict in the evidence, it may be determined from an inspection of the evidence, but the doctrine certainly cannot be correctly applied in cases where

the evidence is conflicting. * * * We believe that as a general rule resort to the evidence is not proper or permissible. * * * There is no tinge of right in a claim that the court or the adverse party must explore the evidence to determine whether a ruling upon demurrer was or was not harmless. * * * It is carrying the rule quite far enough to hold that if the record proper, as a special finding, a special verdict, or the like, affirmatively shows the harmlessness of an erroneous ruling the error will not avail the party against whom it was committed. Beyond that it cannot be carried without producing discord and working injury.”

We believe this to be a correct statement of the general rule, and it is fully sustained by the overwhelming weight of authority, and by the decisions of this court and the Supreme Court rendered both before and since the decision of the case of *McFadden v. Schroeder*, *supra*. To the extent, therefore, that the case holds that an appellate tribunal, in determining the effect of a ruling on demurrer, may, or should, look to the evidence where there is a conflict therein, or where it is of such a character that different conclusions may be drawn therefrom by reasonable minds, the case is overruled.

The following cases throw some light upon the question, and support the conclusions already announced: *McComas v. Haas* (1884), 93 Ind. 276; *Messick v. Midland R. Co.* (1891), 128 Ind. 81, 84; *Hormann v. Hartmetz* (1891), 128 Ind. 353; *Bowlus v. Phenix Ins. Co.* (1892), 133 Ind. 106, 118, 20 L. R. A. 400; *Jackson v. Neal* (1894), 136 Ind. 173; *Pyle v. Peyton* (1896), 146 Ind. 90, 93; *Norris v. Tice* (1895), 13 Ind. App. 17; *Kern v. Saul* (1895), 14 Ind. App. 72; *Kniss v. Holbrook* (1896), 16 Ind. App. 229; Elliott, App. Proc. §§591, 634, 637, 638, 669.

The rule that an error will not be cause for reversal, where the record affirmatively shows that the error
18. was not harmful to the complaining party, is of general application, and usually leads to salutary results.

Where it affirmatively appears that judgment rests upon a good paragraph of complaint, the fact that an insufficient paragraph may have been held good is a harmless error. Likewise, where a demurrer is sustained to a good paragraph of answer, and the same proof is admissible under another paragraph held good, such ruling constitutes harmless error, provided such paragraph requires no greater amount of proof than the good paragraph erroneously held bad.

The harmlessness of an error in passing upon a demurrer may also appear from a special finding of facts, a special verdict, or from an agreed statement of facts. But

17. when the question arises upon the overruling of a demurrer to an insufficient paragraph of answer, filed by a defendant who obtains judgment in his favor, the question is quite different, for the probability that the judgment resulted from the conception of the law which led to the erroneous ruling is so great as to suggest caution in the application of the rule. If resort is to be had to the evidence to determine that the error is harmless, it should be limited to cases where there is a total failure of evidence under the paragraph erroneously held good. If there is a conflict of evidence, or if it is of such a character that reasonable minds may draw different conclusions therefrom, the court cannot safely say, as a matter of law, that the error is harmless, and to attempt to do so will only lead to confusion and uncertainty.

A person who claims that an error is harmless should take the burden of showing it to be so; for the time required by the court to ascertain the fact, unaided by counsel, could, with more justice, be applied to the disposition of the business of other litigants awaiting the action of the court. If this is not done by counsel, the matter will, of necessity, be, to a large extent, discretionary with the court, for in many cases, even though there is a total failure of evidence under the bad paragraph, the fact is not readily ascertainable.

Applying the rule thus interpreted to this case, there

seems to be a total failure of evidence on the vital issue attempted to be presented by the ninth paragraph of answer. But when we come to the sixth paragraph, we find that, so far as it goes, it is similar to the seventh paragraph, which was held sufficient, and it is impossible for us to say that the court, in finding for defendant, did not adhere to the lower standard of the insufficient sixth paragraph, rather than to that of either of the good paragraphs of answer. In fact, it is probable that the trial court, taking into consideration the peculiar provisions of the deeds, the situation of the parties, the original obligation, the payment of interest for so long a time by John Gregory, the acquiescence of appellee in the continuation of the mortgage upon his land, without taking steps to remove it, other than his negotiations with the original obligor of the note, and other facts appearing from the evidence, concluded that the parties themselves had put a construction on the contract that the court did not feel warranted in setting aside, and therefore gave judgment accordingly. But we cannot know from the record that such was the case, for the judgment may have been rendered on the belief that the evidence supported the sixth paragraph of answer, and that alone may have been the basis of the court's conclusion.

The language of the deeds, with reference to encumbrances and the consideration, is such as to warrant a court in adopting a construction placed thereon and acted upon by the parties, if fully established by the evidence; but such possibility does not render harmless the ruling on the demurrer.

The questions of law arising on the motion for a new trial have already been decided by this opinion, and the only remaining question is the sufficiency of the evidence to support the finding and judgment. But this we need not pass upon, as the case must be reversed because of the errors in rulings upon the demurrers to the answers.

The judgment is therefore reversed, with instructions to

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the lower court to sustain the motion for a new trial, to sustain the demurrers to the sixth and ninth paragraphs of answer, to permit the parties to amend their pleadings if desired, and for further proceedings not inconsistent with this opinion.

LAKE SHORE AND MICHIGAN SOUTHERN RAILWAY COMPANY v. CHICAGO, LAKE SHORE AND SOUTH BEND RAILWAY COMPANY.

[No. 7,664. Filed November 18, 1910. Rehearing denied June 23, 1911. Transfer denied November 1, 1911.]

1. NUISANCE.—*Use of Property.—Incidental Damage.—Maxims.*—Though the maxim "*sic utere tuo ut alienum non laedas*" expresses a well-settled rule of law, it must be limited in its broad statement so as not to include the damages incident to the proper use of property, expressed in the words "*damnum absque injuria*." p. 586.
2. NUISANCE.—*Definition.—Statutes.*—"Whatever is injurious to health, or indecent, or offensive to the senses, or an obstruction to the free use of property, so as essentially to interfere with the comfortable enjoyment of life or property," constitutes the statutory definition of a nuisance (§291 Burns 1908, §289 R. S. 1881); and it is for the courts to determine whether the particular facts bring the case within the statute. p. 588.
3. RAILROADS.—*Interurban.—Nuisance.*—The use of a high voltage of electricity by an interurban railroad does not constitute a nuisance *per se*, where it is authorized by law, though the circumstances and manner of such use may make it a nuisance. p. 588.
4. PLEADING.—*Allegations.—How Considered.*—A pleading is presumed to contain all the facts in the party's favor. p. 588.
5. INJUNCTION.—*Steam Railroads.—Interurban Railroads.—Use of Electricity.—Complaint.*—A complaint by a steam railroad company to enjoin an interurban railroad company from operating its line, alleging that defendant has installed and is using high-tension currents of electricity, that by induction all electrical conductors in proximity to such system are caused thereby to have similar electrical currents, that such currents interfere with the plaintiff's telegraph lines, that such interference could have

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been avoided by defendant's installation of electrical devices and appliances, and that upon the completion of defendant's road the interference will destroy plaintiff's use of its telegraph lines, to its damage, does not state a cause of action. pp. 588, 589, 591, 593, 594.

- 6. RAILROADS.—*Interurban*.—*Eminent Domain*.—Interurban railroad companies are *quasi*-public corporations, and are empowered to select their routes, and to condemn the property necessary for their use. p. 589.
- 7. DAMAGES.—*Sine Injuria*.—*Use of Property*.—*Legislative Sanction*.—One using his property under legislative sanction, in a reasonable and proper way, without malice or negligence, is not liable for incidental damages to others, such injuries being regarded as "*damnum absque injuria*"; and the fact that the plaintiff was established in the use of his property before defendant located and established its business does not affect the question. p. 590. -
- 8. EVIDENCE.—*Judicial Notice*.—*Electricity*.—Courts take judicial notice that 33,000 volts of electricity, if uncontrolled, is dangerous to life, limb and property. p. 593.
- 9. CONSTITUTIONAL LAW.—*Destruction of Property*.—*Use*.—The legislature has no power to authorize such a use of property as virtually to deprive an adjoining owner of the legitimate and proper uses of his property. p. 593.

From Laporte Superior Court; *Harry B. Tuthill*, Judge.

Suit by the Lake Shore and Michigan Southern Railway Company against the Chicago, Lake Shore and South Bend Railway Company. From a judgment for defendant, plaintiff appeals. *Affirmed*.

John B. Peterson, and *Glennon, Cary, Walker & Howe*, for appellant.

F. J. Lewis Meyer, *D. E. Morgan* and *Kline, Tolles & Morley*, for appellee.

MYERS, J.—On August 31, 1909, appellant was, and for years prior thereto had been, a duly incorporated railway company, engaged in operating a line of steam railroad on its private right of way from Chicago, Illinois, to Buffalo, New York, and in Indiana, in part, from Gary to South Bend; that on said day appellee was engaged in constructing on its private right of way, adjacent to appellant's right of way,

an electric railway, between the town of Gary and the city of South Bend, paralleling appellant's line of railroad, a portion of which had been constructed and was being operated; that appellee's cars were operated by an electric system known as "the single phase alternating current;" that by reason of the proximity of the two lines of railroad, and the manner of construction and mode employed by appellee in operating its railway, the high-tension current of electricity used by it greatly interfered with the maintenance and use by appellant of its system of electric telegraph lines and signals necessary in the operation of its railroad. For the purpose of stopping such interference, this suit was commenced by appellant to enjoin appellee from operating its said line of railway until it should install such electrical devices, or other appliances, as will neutralize the inductive current of electricity alleged to be the cause of appellant's trouble.

A demurrer to appellant's complaint, for want of facts, was sustained, and judgment on demurrer was rendered. The questions presented by this appeal relate to the sufficiency of the complaint.

It must be kept in mind that neither negligence, unskillfulness nor malice is charged in the construction, maintenance or operation of appellee's line of railway, and that appellant is basing its right to relief solely on the broad principle "that the person who for his own purposes brings on his lands and collects and keeps thereon anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape." *Fletcher v. Rylands* (1866), L. R. 1 Ex. *265.

Appellant earnestly insists that the doctrine enunciated in the case cited controls this case, for the reason that appellee is engaged in a business upon its own premises,

1. that requires the use of an element that escapes to the premises of appellant, unwarrantably interfering with the latter's use and enjoyment thereof, and is a nui-

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sance, when measured by the rule that anything is a nuisance which annoys or disturbs one in the possession of his property, and renders its ordinary use or occupation physically uncomfortable to him. *Baltimore, etc., R. Co. v. Fifth Baptist Church* (1883), 108 U. S. 317, 2 Sup. Ct. 719, 27 L. Ed. 739.

This insistence, if sustained and allowed to control the vital questions in this case, must be limited to the maxim, *sic utere tuo ut alienum non laedas*, often applied where one violates a duty which he owes to another as furnishing a general description of a nuisance. While the principle thus stated is as sound as it is old, "a nuisance does not necessarily exist even though one may by the use of his own property cause an injury or damage to another. The case may be one known as *damnum absque injuria*, and the factors of locality, of unauthorized, or unreasonable use are of weight." Joyce, Nuisances §29.

It will, therefore, be seen that the principle involved in this maxim contemplates a legal injury to the property of another, "for the rightful use of one's own land may cause damage to another, without any legal wrong. So a man may do many things under a lawful authority, or in his own land, which may result in an injury to the property of others, without being answerable for the consequences. Indeed an act done under lawful authority, if done in a proper manner, can never subject the party to an action whatever consequences may follow. A man may enjoy his land in the way such property is usually enjoyed, without being answerable for the indirect or consequential damages which may be sustained by an adjoining landowner. It follows that the maxim *sic utere*, etc., is undoubtedly to be so limited in its application as not to restrain the owner of property from a prudent and reasonable exercise of his right of dominion. If in the exercise of his right, another sustains damage it is *damnum absque injuria*, for in the matter of things and society, it is not reasonable that every annoyance should con-

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stitute an injury such as the law will remedy or prevent.” Joyce, Nuisances §32.

In this State, by statute, “whatever is injurious to health, or indecent, or offensive to the senses, or an obstruction to the free use of property, so as essentially to interfere

2. with the comfortable enjoyment of life or property, is a nuisance, and the subject of an action.” §291 Burns 1908, §289 R. S. 1881.

There is no claim that the business as carried on by appellee was injurious to health, or indecent, or offensive to the senses, but that it was an obstruction to the free use of property, and essentially interfered with the comfortable enjoyment thereof. The legislature has declared in general language what constitutes a nuisance, and it is for the court to determine whether the facts charged bring the particular case within the statute.

The business carried on by appellee was not a nuisance *per se*. It was and is expressly authorized by statute (Acts 1903 p. 92, §1, §5675 Burns 1908). But the fact

3. alone that appellee is engaged in a lawful business will not protect it if guilty of maintaining an actionable nuisance, for a lawful business may be of such a nature, or so situated or conducted, depending upon the circumstances, as to become a nuisance. *Foor v. Edwards* (1910), 45 Ind. App. 259; *Pritchett v. Board, etc.* (1908), 42 Ind. App. 3.

In this case, on the theory that a party's pleading is presumed to be as strongly in his favor as the facts will warrant (*W. B. Conkey Co. v. Larsen* [1910], 173 Ind.

4. 585), we may assume that the electrical system used by appellee was the best devised, and that it was carefully and skilfully employed. Appellant's property has not been physically injured, nor any of it taken; nor has

5. appellant been damaged in any stated amount; but it is alleged, in substance, that the high-tension current of electricity employed by appellee, through what is

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scientifically known as induction, caused electrical currents of similar character in all electrical conductors in proximity to the trolley system, thereby interfering with the operation by appellant of its telegraph lines, using electrical currents of small intensity, and that such interference could have been obviated by appellee's installing electrical devices and appliances; that upon the completion of appellee's road, the interference will become continuous, entirely depriving appellant of the use of said telegraph lines, in the value of several thousands of dollars, and to its damage in a sum not susceptible of being estimated.

It must be kept in mind that this is a suit to enjoin appellee from operating its road, on the ground that it is guilty of maintaining a nuisance. Appellee is a

6. *quasi*-public corporation, authorized to exercise the right of eminent domain. Acts 1903 p. 92, §3, §5679 Burns 1908. The public is concerned in the business in which appellee is engaged. The State has sanctioned it, and has vested appellee with authority to select a place of operation. Appellee is not charged with making an unlawful use of any privilege conferred upon it by the State, nor

5. with using the premises selected for the purpose of carrying on its business in any manner not contemplated by the statute. This controversy is between users of electricity—appellant using light currents, and comparatively delicate instruments, which are interrupted by escaping currents from the wires belonging to appellee, which carry exceedingly high voltage.

It is not a question between one engaged in the ordinary development of his land, and the customary and appropriate employment of it, according to its inherent qualities and its surroundings, without bringing upon it artificially any substance not naturally found there (*Evans v. Reading Chemical, etc., Co.* [1894], 160 Pa. St. 209, 28 Atl. 702; *Pennsylvania Coal Co. v. Sanderson* [1886], 113 Pa. St. 126, 6 Atl. 453, 57 Am. St. 445), and one engaged in the unnatural and

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extraordinary use of his property, calling for the application of the maxim *sic utere tuo*, etc., which is the governing principle in the cases of *Fletcher v. Rylands*, *supra*, and *Rylands v. Fletcher* (1868), L. R. 3 H. L. 330.

In this case the use of electricity is common to both parties, and both are acting under legislative sanction. In such

cases, it seems to be the consensus of opinion, both in

7. England and in this country, that where one is acting under legislative authority, and within the right thus given, and reasonably within the exercise thereof, using care and caution regarding the rights of his neighbor, any inconvenience, or incidental damage, that may arise in the absence of any negligence from the reasonable use of his own property, will be regarded as within the rule *damnum absque injuria*. *National Tel. Co. v. Baker*, [1893] 2 Ch. 186; *London, etc., R. Co. v. Truman* (1885), 11 App. Cas. 45; *Eastern, etc., Tel. Co. v. Capetown Tramways Cos.*, [1902] A. C. 381; *Cumberland Tel., etc., Co. v. United Electric R. Co.* (1890), 42 Fed. 273, 281, 12 L. R. A. 544; *Cincinnati, etc., R. Co. v. City, etc., Tel. Assn.* (1891), 48 Ohio St. 390, 27 N. E. 890, 12 L. R. A. 534, 29 Am. St. 559; *Hudson River Tel. Co. v. Watervliet, etc., R. Co.* (1892), 135 N. Y. 393, 32 N. E. 148, 17 L. R. A. 674, 31 Am. St. 838; *Losee v. Buchanan* (1873), 51 N. Y. 476, 10 Am. Rep. 623; *Cosulich v. Standard Oil Co.* (1890), 122 N. Y. 118, 25 N. E. 259, 19 Am. St. 475; *Brown v. Collins* (1873), 53 N. H. 442, 16 Am. Rep. 372; *Everett v. Hydraulic, etc., Tunnel Co.* (1863), 23 Cal. 225; *Pirley v. Clark* (1860), 32 Barb. 268.

Our attention has been called to the fact that appellant was engaged in operating its railroad, telegraph and signal wires long prior to the location and operation of the electric road by appellee, but this fact can have no legal bearing on the question involved, for as said in Thompson, *Electricity* p. 57 "in both of these cases the one having the prior right must yield his right and submit to damage and inconvenience to some extent for the good of his neighbor and of society."

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The court, in the case of *National Tel. Co. v. Baker*, *supra*, in considering the principle announced in *Fletcher v. Rylands*, *supra*, said that it had never been applied in

5. English law to a state of facts like those under consideration, and in speaking of the American law, the court then concluded the question settled in this country, that the owner of land used for an unnatural or extraordinary purpose is "responsible for the consequences of such user to his neighbor only when they result from that owner's negligence; and if he can satisfy the court that he has not been guilty of negligence, the resulting damage to his neighbor is not actionable." In the same case it was said: "The defendants are expressly authorized to use electrical power, and the legislature must be taken to have contemplated, and to have condoned by anticipation any mischief arising from a reasonable use of such power."

The court in the case of *Cumberland Tel., etc., Co. v. United Electric R. Co.*, *supra*, was considering a case brought by the telephone company against the electric railway company, wherein the plaintiff sought to enjoin the defendant from using electric energy to propel its cars under any system which makes use of the earth for its return circuit. It was shown that the current used by the railway company was stronger than that used by the telephone company, and through various agencies, known as "conduction," the stronger currents used by the railway company overcame the weaker currents used by the telephone company, and greatly interfered with telephonic communication. The court said: "We understand the law to be well settled that no person is liable for damages incidentally occasioned to another by the necessary and beneficial use of his own property, or of a franchise granted to him by the state. The principle is thus stated by Judge Woodworth in *Panton v. Holland* [1819], 17 Johns. *92, *99, 8 Am. Dec. 369: 'On reviewing the cases, I am of opinion that no man is answerable in damages for the reasonable exercise of a right, when it is

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accompanied by a cautious regard for the rights of others, when there is no just ground for the charge of negligence or unskilfulness, and when the act is not done maliciously.' ” It was further said: “The substance of all the cases we have met with in our examination of this question—and we have cited but a small fraction of them—is that, where a person is making lawful use of his own property, or of a public franchise, in such a manner as to occasion injury to another, the question of his liability will depend upon the fact whether he has made use of the means which, in the progress of science and improvement, have been shown by experience to be the best; but he is not bound to experiment with recent inventions, not generally known, or to adopt expensive devices, when it lies in the power of the person injured to make use himself of an effective and inexpensive method of prevention.” The injunction in said case was denied on the following grounds: “(1) That the defendants are making lawful use of the franchise conferred upon them by the state, in a manner contemplated by the statute, and that such act cannot be considered as a nuisance in itself. (2) That, in the exercise of such franchise, no negligence has been shown, and no wanton or unnecessary disregard of the rights of the complainant. (3) That the damages occasioned to the complainant are not the direct consequence of the construction of the defendants’ roads, but are incidental damages resulting from their operation, and are not recoverable.”

In the case at bar it is said that appellee, by the use of certain appliances, could prevent the escape of electricity from its wires. No suggestion is offered as to the character of these appliances, or whether they are in general use, nor is anything said in the way of approximating the expense to appellee from their adoption, nor does it appear that appellant might not, by some inexpensive method, have prevented the annoyance to which it is now subjected.

We know that electricity, to the extent necessarily employed by appellee in moving its cars—33,000 volts—if un-

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controlled, would produce injury to life, limb and
8. property, but such a condition is not present. The
escaping currents do not affect appellant in the enjoyment of its property, aside from annoyance when using its fixtures that carry small electric currents; nor does it appear that other neighbors in the natural use of their property are at all disturbed. Therefore, as said in *Eastern, etc., Tel. Co. v. Capetown Tramways Cos., supra*: "The principle of *Rylands v. Fletcher* [(1868), L. R. 3 H. L. 330], which subjects to a high liability the owner who uses his property for purposes other than those which are natural, would become doubly penal if it implied a liability created and measured by the nonnatural uses of his neighbor's property."

Here we have two adjoining owners, using their property for the same general purposes, and each exercising an undoubted legal right, and neither charged with negligence,
5. gence, unskilfulness nor malice. They belong to that class of owners known as legislative-empowered, non-natural or extraordinary users of land. The peculiar apparatus in use by one, is said to be rendered less efficient by the escaping electric currents from the appliances in use by the other, but no tangible or sensible injury to person or property of the complainant is shown. There are so many exceptions that must be recognized when formulating any general rule defining the respective rights of such owners in the use of their property, that very few courts have attempted to formulate such a rule without the element of negligence, unskilfulness or malice. So the courts in this country, contrary to the principle of *Fletcher v. Rylands, supra*, are agreed in holding the owner of land, under the facts here appearing, responsible for the consequences of such user only when they result from the owner's negligence.

It is true that legislative authorization to take and
9. use property does not extend to the point of depriving, without redress, an adjoining owner of the legiti-

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mate uses and rights in his property, nor does it permit one neighbor to set up such a condition on his premises as will exclude a subsequent comer on adjoining land from its proper and lawful uses. It is not alleged that appellee was

conducting without care and skill upon its premises

5. a *quasi*-public enterprise by virtue of legislative authority, nor that it had not adopted, or was not maintaining in good repair, such appliances as are generally recognized as the best and most approved for the business in which it was engaged, nor was it charged with any unwarrantable, unreasonable or unlawful acts or use of its property. As we see this case, the controlling principle in many respects is analogous to the principle that protects a steam railroad from the charge of maintaining a nuisance, preferred by an adjoining owner because of the annoyance, discomfort or injury caused by the noise and vibration from its trains, and by the sparks, coals of fire and smoke emitted from its engines and thrown upon the premises of such adjoining owner, which would amount to an actionable nuisance were it not that the operation of the railroad had legislative sanction.

Judgment affirmed.

ON PETITION FOR REHEARING.

MYERS, J.—Appellant in support of its petition for a rehearing cites the case of *Peoria Water-Works Co. v. Peoria R. Co.* (1910), 181 Fed. 990, as announcing a rule of

5. law contrary to that expressed by this court at the former hearing of this case. At that time we were not advised as to the ruling in that case, but in consideration of the petition before us we have carefully examined the facts and opinion of the court as reported, without being persuaded that there is any conflict in the two opinions.

In the case just cited, the relief sought was an injunction to prevent injury to water-mains by electrolysis. The case was referred to a special master for his findings of fact and

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conclusions of law. At page 996 it is said: "The ultimate facts disclosed by the evidence may be briefly summarized as follows: (1) The injury complained of exists. (2) The injury is permanent and continuing. (3) The injury has been and is being caused by the defendants. (4) The complainant can do nothing to prevent the injury." Under the heading "Conclusions of Law," on page 997, it is said: "(6) The injury which is being done to complainant's water-pipes by the defendants' currents of electricity is not a mere incidental injury or inconvenience, but is a permanent, continuing injury to a legal right, which will, in effect, if the injury is permitted to go on, ultimately result in the absolute destruction of complainant's plant and property." It is also said, at page 998: "(1) It is possible for the defendants so to operate their railways by electric motive power as not to injure the complainant's property. (2) It is impossible by any known method for the complainant to protect its property from such injury. * * * (4) The failure on the part of the defendants to observe such duty constitutes negligence, and, when it results in damage to another, such damage is actionable. * * * (10) The injury found to be going on in this case is the direct consequence of the unnecessary and wrongful acts of the defendants in accomplishing a legal result."

In the course of the opinion of the court, at page 1003, it is said: "At the outset it may be said that the court has no power to prescribe by injunction the use of any particular system of circuit or negative return. It is doubtful, indeed, whether the judicial power would extend to the making of a decree restraining the defendant from continuing to serve the public unless it shall cease injuring complainants' water system."

The facts set forth in the complaint at bar are entirely different from the facts found in the case cited. In the latter case the water company was powerless to prevent the injury of which it complained. In this case, appellant, at a

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small expense, might have remedied the trouble. It was within the power of the railway company to minimize the escape of its electric currents, and thereby prevent a destruction of the water company's property. In this case, appellee may be using the most approved apparatus known to science. In the case of *Peoria Water-Works Co. v. Peoria R. Co.*, *supra*, the findings show that the railway company was guilty of negligence, and that the injury was the direct result of the unnecessary and wrongful acts of defendants. In the case at bar, appellant expressly declines to base its asserted right on the theory of negligence, unskilfulness or malice in the construction, maintenance or operation of appellee's line of railway.

Finding no reason for granting appellant's petition for a rehearing, it is overruled.

POER v. JOHNSON.

[No. 7,324. Filed November 2, 1911.]

1. APPEAL.—*Weighing Evidence*.—The Appellate Court will not weigh conflicting evidence. p. 597.
2. ACCORD AND SATISFACTION.—*Plea of*.—*Failure to Object to Evidence of*.—*Notes*.—In an action on a note, accord and satisfaction constitutes an affirmative defense that should be answered specially; but a failure to object to evidence thereof, is a waiver of such special plea. p. 598.
3. NEW TRIAL.—*Newly-Discovered Evidence*.—*Cumulative*.—*Diligence*.—A new trial on the ground of newly-discovered evidence will not be granted, where such evidence would be merely cumulative, or where the only diligence shown to secure such evidence before the trial was to make a general and indefinite inquiry of a witness as to whether he knew anything about the case, to which the witness answered that he knew nothing. p. 598.

From Rush Circuit Court; *Will M. Sparks*, Judge.

Action by Chauncey K. Poer against Joseph S. Johnson. From a judgment for defendant, plaintiff appeals. *Affirmed*.

Megee & Kiplinger, for appellant.

Watson, Titsworth & Green, for appellee.

IBACH, J.—Action by appellant on two promissory notes, of the aggregate amount of \$500, executed by appellee. Answer in three paragraphs. The first was a general denial, the second, a plea of payment, and the third set up the discharge of appellee in bankruptcy, and that appellant filed the notes as claims and received his distributive share of the proceeds of the bankrupt estate, amounting to \$20.50. A reply admits the truth of the third paragraph of answer, and alleges that the debt was revived by a new promise after discharge in bankruptcy. Trial by jury resulted in a judgment for appellee.

The principal question presented by this appeal is whether the verdict is supported by the evidence. The testimony to the effect that appellee promised to pay appellant the 1. notes is largely controverted. Another conflict in the evidence is whether the notes were fully paid in a horse trade between the parties. Appellee traded a team of draft mares to appellant for a team of mules of less value. Appellant testified that the difference in the value of the teams was to be counted as \$165, and applied as a part payment on the notes in suit, and that the remainder of the amount of the notes is due to him. Appellee testified that appellant wanted him to let the difference go on the notes, but that he refused, and told appellant—using his own words—“We would trade if they [appellant and his brother] would count the notes paid, give the mares and mules, and count the deal squared,” and that appellant and his brother “hated to do it, but said they would.” The evidence of each is supported by other witnesses. Thus there is evidence fairly supporting the verdict, for the jury might have found for appellee, either on the theory that he never made a new promise to pay the notes, or on the theory that the notes were fully satisfied in the horse trade. Appellate

courts will not weigh evidence, and where the question is, as here, on the weight of conflicting testimony, the verdict of the jury will not be disturbed.

Appellant claims that the evidence for the defense shows, if anything, accord and satisfaction of the notes, not
2. payment, and that as accord and satisfaction was not specially pleaded, such evidence would not support a finding for appellee under the issues in the case.

The general rule is that the defense of accord and satisfaction, to be admissible, must be specially pleaded, and that evidence showing such is not admissible under a plea of payment. But in this case, appellant allowed the evidence that he claims shows accord and satisfaction to go in without objection of any kind. By the weight of authority, any failure of defendant to plead accord and satisfaction specially is waived by plaintiff's failure to object to the evidence of it on that ground. 1 Cyc. 341, and cases cited; *Berdell v. Bissell* (1882), 6 Colo. 162; *Freiermuth v. McKee* (1900), 86 Mo. App. 64.

Appellant also assigns the discovery of new evidence, as a reason for new trial. No error was committed in refusing to grant a new trial for this reason, for the affidavit
3. shows that the evidence would be only cumulative, and also shows that appellant did not use reasonable diligence to discover the new evidence. It appears in the affidavit that before the trial appellant asked the new witness, who was his brother, whether he knew anything relating to the cause, and the witness responded that he knew nothing, for the reason, as he alleges in his affidavit, that he believed that the testimony, which he is now ready to give, was not competent or material. This affidavit shows a lack of diligence, for the inquiry made by appellant before the trial appears to have been general and indefinite, and not such as a reasonably prudent man would make under the circumstances. *Cheek v. State* (1898), 171 Ind. 98; *Williams v.*

State (1908), 170 Ind. 630; *Donahue v. State* (1905), 165 Ind. 148.

No error appearing in the action of the trial court, the judgment is affirmed.

WEEK v. RAWIE.

[No. 7,122. Filed November 3, 1911.]

1. EVIDENCE.—*Depositions.—Rebuttal Testimony.—Objections.*—An objection to certain parts of a deposition on the ground that they were admissible only in rebuttal is not well taken, where they are at all admissible under the issues, either directly, or in rebuttal of testimony which might be admitted. p. 601.
2. EVIDENCE.—*Depositions.—Patent Facts.—Objections.—When Made.*—Where grounds of objection are disclosed on the face of depositions, objections made at the trial are too late. p. 601.
3. EVIDENCE.—*Conclusions.—Responsiveness.*—Questions to witnesses should not call for conclusions; and answers of witnesses, whether in a trial, or in the taking of depositions, should be responsive to the questions propounded. p. 601.
4. EVIDENCE.—*Admission.—Discretion.—Appeal.*—The trial court has a wide discretion as to the form and character of questions asked of witnesses at a trial, and such acts of discretion will be disturbed on appeal only for abuse thereof. p. 602.
5. WORK AND LABOR.—*Evidence.—Explanations not Called for.*—In an action for work and labor, the plaintiff being asked if he had "any negotiations" with defendant relative to the work in question, his answer that he "did," followed by defendant's conversation in reference thereto is not harmful, where such conversation, though unresponsive, was admissible within the issues. p. 602.
6. WORK AND LABOR.—*Evidence.—Conclusions.*—In an action for work and labor, the question to the plaintiff "Did you agree to take charge of said surveying?" called for a conclusion; but such question was not harmful, where the plaintiff had testified to the defendant's request for him to do the work and of his performance thereof, the request and performance entitling plaintiff to a recovery. p. 602.
7. WORK AND LABOR.—*Evidence.—Declarations.*—In an action for work and labor, the plaintiff being asked to state what was said by defendant as to time of work and pay, his answer that defendant "agreed" to pay him \$125 a month and expenses must have

been understood by the jury to mean that defendant "said" that he would pay him such sum, and was, therefore, harmless. p. 603.

8. **WORK AND LABOR.—Evidence.—Improper Question.—Proper Answer.**—In an action for work and labor, an improper question answered by a statement of the time plaintiff commenced and quit work, is harmless, such answers being competent. p. 603.
9. **WORK AND LABOR.—Evidence.—Person for Whom Labor was Performed.**—In an action for work and labor, the plaintiff being asked whether he had negotiations with anyone besides defendant for the performance thereof, his answer that he had not, followed by explanations that he had talked to no one else, does not constitute reversible error. p. 603.
10. **WORK AND LABOR.—Agreements of Agent to Pay.—Instructions.**—In an action against defendant for work and labor, an instruction that if plaintiff performed the work alleged, and was employed by an officer of a corporation to do such work for such company, and the work was done pursuant thereto, the defendant would not be liable "unless he expressly agreed to pay the same," is not erroneous, since an express promise by defendant to pay for work done at his request imports an original undertaking for himself, and such request coupled with performance by plaintiff shows a consideration for the contract. p. 604.

From Madison Circuit Court; *John F. McClure*, Judge.

Action by Henry Rawie against Edmund R. Week. From a judgment for plaintiff, defendant appeals. *Affirmed*.

Willis S. Ellis, for appellant.

Kittinger & Diven, for appellee.

MYERS, J.—This was an action by appellee against appellant, to recover a sum of money demanded for work and labor performed by him at the special instance and request of appellant. The complaint was answered by a general denial. A jury trial resulted in a verdict in favor of appellee for \$159.75. Judgment was rendered on the verdict.

Appellant's motion for a new trial was overruled, and this ruling is assigned as error. Under this assignment all the questions to be considered are presented. The evidence in this case was in the form of depositions. Before the day of trial, appellant moved to suppress certain questions and an-

swers, and parts of answers, in appellee's deposition, and in the deposition of W. W. Huffman, a witness for appellee, but the motion was overruled. At the trial, while the depositions were being read to the jury, appellant objected to certain questions and answers, and moved to strike out certain answers and parts of answers, all of which objections and motions were by the court overruled. These rulings of the court are assigned as causes for a new trial.

We are not persuaded that they were erroneous. It frequently happens that portions of a deposition would be more properly admissible as evidence in rebuttal, but if

1. the evidence thus proposed to be introduced is admissible at all under the issues, or if it would tend to rebut any evidence that might be introduced under the issues, an objection to its introduction because only admissible on rebuttal, is not well taken. *Indianapolis, etc., R. Co.*

v. Anthony (1873), 43 Ind. 183. The depositions

2. disclosed the grounds on which the objections were based, and for that reason other objections made at the trial came too late. *Newman v. Manning* (1883), 89 Ind. 422; *Fruckey v. Eagleson* (1896), 15 Ind. App. 88. After carefully reading all the evidence in the record, keeping in mind the motion to suppress, and the reasons supporting it, we have concluded that in some particulars it ought to have been sustained, although the court's refusal to do so did not amount to reversible error.

A question calling for the conclusion of a witness is a practice to be condemned, and an objection timely made to such question should be promptly sustained by the

3. court. Another well-settled rule requires answers to be responsive to the question. These rules apply not only to the examination of witnesses before a jury, but also to evidence presented by deposition. In this case it is claimed that the trial court permitted flagrant violations of these rules, and this court is called on to review that court's action in the premises.

For the purpose of aiding the jury in reaching a correct determination of the issues, it must be conceded that the trial court has a wide discretion as to the form and

4. character of the questions that may be asked a witness (*Indiana R. Co. v. Maurer* [1903], 160 Ind. 25; *Chicago, etc., R. Co. v. Long* [1896], 16 Ind. App. 401); and this court will not interfere with such discretion, unless it clearly appears that substantial injustice has resulted from its abuse. We shall not take the time to notice each question and answer to which the motion was addressed, as what we shall say in disposing of those we regard as most vital to this appeal will suffice to cover those not specially mentioned. The complaint, except the formal parts, is as follows: "Henry Rawie complains of Edmund R. Week, and says that said defendant is indebted to him, for work and labor done and performed at his special instance and request, in the sum of \$105, which work and labor was done and performed in surveying in Laporte and Saint Joseph counties in the State of Indiana, and at the special instance and request of defendant; that it was done and performed in the year 1898; that there has been long and unreasonable delay in the payment thereof, and that there is due said plaintiff thereon said sum of \$105, together with interest since 1899, which is wholly unpaid."

It appears that appellee, after stating that he had done some engineering work for appellant, for which work appellant paid him, was asked whether, after that time, he

5. had "any negotiations" with appellant relative to any additional work, to which he answered: "I did;" adding what appears to be appellant's part of the conversation with reference to what he wanted him to do. This part of the answer was certainly not responsive to the question, but was clearly admissible under the issues, had the question called for the conversation. Following this

6. answer was the question: "Did you agree to take charge of said surveying? and if so, and anything was

said as to the amount that was to be paid to you, and the time you were to work, state what it was." That part of the question, "Did you agree to take charge of said surveying?" called for a conclusion of the witness; but as the complaint proceeded on the theory of a claim for work and labor performed at appellant's special instance and request, and the witness having testified to the request, and having done the work, the question of whether he agreed to do the work was not a fact essential to appellee's recovery. While the form of the question was bad, and had its effect on the answer of the witness, which was, "I agreed to take charge of the work," yet, as we view this evidence, that part of the question and answer was not such as would work material harm to appellant. The remainder of the answer, evidently

in response to the remaining part of the question,

7. calling for what was said as to the amount he was to receive, is also subject to criticism. It was: "He agreed to pay me \$125 a month and all expenses. He stated to me then and there that he would pay me for the work, or see that I was paid said amount." The vice of the answer is in the use of the word "agreed," but when considered in connection with the question calling for what was said on that subject, and in view of the latter part of the answer, the words "he agreed" were used by the witness in the sense of "he said" or "he stated," and we are inclined to believe that he was so understood by the jury.

The next question was objectionable, but the answer

8. was not, for the reason that it merely stated the time he commenced to work and when he quit.

The next question to which objection is made was not improper, as it merely called for the fact as to whether the witness had ever had any negotiations with any one

9. other than appellant. After answering in the negative, the witness stated that he knew of no other person promoting the enterprise (a traction line between Laporte and Michigan City), and that he (appellant) was the

only man he ever talked with in regard to the work. While, as we have said, the practice of permitting evidence to go to the jury in the form in which some of the evidence in this case was presented must be disapproved, yet from the entire record, and in view of the discretion of the trial court in such matters, we cannot say that it was abused to the extent of being grounds for a reversal of the judgment.

Appellant insists that instruction fourteen is erroneous. It reads as follows: "If you find that plaintiff performed the services alleged in the complaint, and if you find 10. that plaintiff was employed by an officer or agent of the Northern Traction Company for and on behalf of said company, and said services were rendered in pursuance of such contract, then defendant in this case would not be liable *unless he expressly agreed to pay the same.*" Objection is made to the part of the instruction that we have italicized. It is insisted that under this instruction the jury would be warranted in finding against appellant, if he expressly agreed to pay for such services, whether or not there was any consideration for such promise. The instruction must be read in the light of the issues and the evidence. There is no claim that appellant made any promise to appellee after he began work, nor is it claimed by either party that appellant's promise was conditioned on the failure of any one else or of the Northern Traction Company to pay for the work. The wording "*expressly agreed to pay the same,*" signifies a primary or original undertaking to pay, and such agreement is not within the statute of frauds. *Week v. Widgeon* (1899), 23 Ind. App. 405. It will not do to say that a promise on the one side and complete performance on the other is wanting in consideration, or that the promise cannot be enforced because there was no consideration.

Judgment affirmed.

CINCINNATI, BLUFFTON AND CHICAGO RAILROAD v. WALL.

[No. 7,301. Filed November 14, 1911.]

1. **PLEADING.—Complaint.—Demurrer.—Amended Complaint.**—The filing of an amended complaint while a demurrer to the original complaint was pending takes such original complaint out of the record and a subsequent ruling on the demurrer raises no question. p. 608.
2. **Pleading.—Amended Complaint.—Demurrer.**—A demurrer filed after the filing of an amended complaint will be deemed as addressed to such amended complaint, the original complaint being out of the record. p. 608.
3. **INJUNCTION.—Deeds.—Covenants.—Breach.—Railroads.—Complaint.**—A complaint alleging that the plaintiff conveyed a right of way to defendant railroad company's agent, that defendant company accepted and occupied such right of way, that a covenant in such deed required the grantee to construct "a standard fence of woven wire, with barbs on top, sufficient to turn all kinds of stock and should permanently maintain a good and lawful fence," that defendant was threatening to erect an unlawful fence insufficient to turn stock, that the erection of such fence would work irreparable damage to plaintiff and that defendant was insolvent, and praying an injunction, is sufficient when questioned for the first time on appeal. p. 608.
4. **INJUNCTION.—Legal Remedy.**—Injunctive relief will not be denied on the ground that the plaintiff has a legal remedy, unless the legal remedy is as full and adequate as the remedy in equity. p. 608.
5. **INJUNCTION.—Deeds.—Covenants.—Fences.—Railroads.**—Where plaintiff's deed to a railroad company provided for the construction and maintenance by the company of a fence "sufficient to turn all kinds of stock," and the company was threatening to build an insufficient fence, the plaintiff's remedy in equity is much more adequate than his remedy at law, especially where plaintiff used his lands for grazing purposes. p. 609.
6. **INJUNCTION.—Multiplicity of Suits.—Defective Fences.**—Where defendant railroad company agreed to construct and maintain a fence "sufficient to turn all kinds of stock" along its right of way through plaintiff's land, equity will restrain the construction of an insufficient fence on the ground that it will prevent a multiplicity of actions for a breach of the covenant. pp. 609, 610.
7. **INJUNCTION.—Deeds.—Covenants to Construct Fence along Railroad Right of Way.—Statutes.**—The fact that railroad com-

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panies are required by statute to fence their rights of way, does not prevent them from contracting to construct and maintain a particular kind of fence; and they may be enjoined from constructing a different kind of fence from the one contracted for. p. 610.

8. **INJUNCTION.—Restraining Breach of Covenant.—Specific Performance.**—The breach of a contract enforceable by specific performance may be enjoined, the remedy of injunction against a breach being a negative specific performance. p. 610.
9. **SPECIFIC PERFORMANCE.—When Granted.**—In order to enforce specific performance of a contract it must be founded upon a valuable consideration, it must be definite, fair, just, and specifically enforceable against both parties without hardship against either, and there must be no equally adequate legal remedy. p. 611.
10. **SPECIFIC PERFORMANCE.—Contracts.—Definiteness.—Parol Evidence.—Fences.—Injunction.**—A contract by a railroad company to construct and maintain along its right of way "a standard fence of woven wire, with barbs on top, sufficient to turn all kinds of stock" is susceptible of specific performance, parol evidence being admissible to apply the terms thereof to the subject-matter; and the violation of such contract may be enjoined. pp. 611, 614.
11. **INJUNCTION.—Legal Remedy.—Election.**—The fact that plaintiff chose an equitable remedy when he might have secured relief in an action at law, is not a sufficient answer to a suit in equity. p. 612.
12. **INJUNCTION.—Partial Relief.**—Injunctive relief will not be denied on the ground that full relief cannot be awarded; and if one party has fully performed his part of the contract, and the other is in the enjoyment of his rights secured by the contract, he may be enjoined from violating the express affirmative provisions on his part. p. 612.
13. **SPECIFIC PERFORMANCE.—Building Contracts.**—Ordinarily, building contracts will not be specifically enforced; but in certain cases, where justice cannot be otherwise secured, they will be so enforced. p. 614.
14. **SPECIFIC PERFORMANCE.—Discretion.**—The right to specific performance is a matter of sound legal discretion, controlled by equitable principles, and exercised upon a consideration of all the circumstances of the particular case. p. 614.
15. **INJUNCTION.—Breach of Covenant to Fence.—Deeds.—Agency.**—A railroad's breach of covenant to build a particular kind of fence may be enjoined; and the fact that the deed containing the covenant was executed to the company's agent does not affect the matter, where the company was in possession of the land and accepting the benefits of the grant. p. 614.

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16. **APPEAL.—Presumptions.**—On appeal the presumption is in favor of the action of the trial court. p. 615.

From Huntington Circuit Court; *Samuel E. Cook*, Judge.

Suit by Robert Wall against the Cincinnati, Bluffton and Chicago Railroad. From a decree for plaintiff, defendant appeals. *Affirmed.*

Lesh & Lesh, for appellant.

James C. Branyan, John S. Branyan and Wilbur E. Branyan, for appellee.

FELT, P. J.—The complaint shows that by deed, duly executed by appellee and his wife to an agent of appellant, a strip of ground sixty feet wide was conveyed by appellee, and accepted and occupied by appellant as a right of way; that, as a part of the consideration for the conveyance, it was provided in the deed that the grantee should construct “a standard fence of woven wire, with barbs on top, sufficient to turn all kinds of stock and should permanently maintain a good and lawful fence.”

The complaint further averred that appellant was threatening and preparing to erect and maintain, at the place designated in the deed, a fence that was unlawful, and was insufficient to turn stock of all kinds; that the wires were of flimsy material, insufficient in size and strength, the spaces between them were too wide, and the posts were too far apart to make a good fence; that the fence should be not less than four feet high, while the one to be erected was only forty-five inches high, and would be of little value to appellee, because it would not turn hogs and other stock he desired to pasture upon his land adjoining the right of way along which the proposed fence was to be erected; that the erection of said proposed fence would cause irreparable injury to appellee, and in violation of the terms of said deed; that appellant was insolvent.

Issue was joined by general denial. A trial by the court

resulted in a decree restraining appellant from erecting the proposed fence.

The errors assigned are (1) the overruling of the demurrer to the amended complaint, (2) the failure of the amended complaint to state facts sufficient to constitute a cause of action, (3) the overruling of the motion for a new trial.

A demurrer for want of facts was filed to the original complaint. Pending the ruling upon the demurrer, an amended complaint was filed, but the demurrer was not refiled, though it was afterwards overruled and exception taken.

The complaint to which the demurrer was addressed went out of the case when the amended complaint was
1. filed, and the ruling upon the demurrer filed before the amended complaint was filed presents no question as to the sufficiency of the amended complaint.

If the demurrer had been filed after the amended complaint was on file, the fact that it did not designate the pleading as an amended complaint would be immaterial, as
2. the amended complaint was the only one then before the court. *Chicago, etc., R. Co. v. Stepp* (1909), 44 Ind. App. 353; *Scott v. LaFayette Gas Co.* (1908), 42 Ind. App. 614; *City of Vincennes v. Spees* (1905), 35 Ind. App. 389.

The complaint omits no essential element of recovery, and is sufficient to bar another action, so that when first questioned after judgment by independent assignment of
3. error it is sufficient. *Oliver Typewriter Co. v. Vance* (1911), *ante*, 21; *Forrest v. Corey* (1902), 29 Ind. App. 159.

It is contended that the complaint is insufficient, and that the judgment is erroneous, because it appears that appellee has an adequate remedy at law for damages for breach
4. of the covenant in his deed. But it is not sufficient ground for denying an injunction, that there is a

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legal remedy, unless it also appears that the remedy at law is as full and adequate as the remedy in equity.

It fully appears in this case, from both the complaint and the evidence, that the fence to be erected was along the right of way of a railroad, and that the adjoining premises

5. were used for grazing and agricultural purposes.

These facts distinguish the case from cases dealing with the ordinary contracts relating to fences and other structures.

The rule is firmly established in this State, that a party will be granted injunctive relief even though he may have a clear legal remedy, if the remedy at law is not as prompt, practical, efficient and adequate as that afforded by equity. The location of this proposed fence makes this rule peculiarly applicable here, for it is unreasonable to say that appellee's remedy for damages, which would be available after his stock had escaped from the enclosure, and, possibly, had been lost or killed, is as adequate and practical as the remedy by injunction. *Brugh v. Denman* (1906), 38 Ind. App. 486; *Hatfield v. Mahoney* (1907), 39 Ind. App. 499; *Ingle v. Bottoms* (1903), 160 Ind. 73; *Chappell v. Jasper County, etc., Gas Co.* (1903), 31 Ind. App. 170; *Miller v. Bowers* (1902), 30 Ind. App. 116; *Denny v. Denny* (1887), 113 Ind. 22; *Beatty v. Coble* (1895), 142 Ind. 329; *Sullivan v. Kohlenberg* (1903), 31 Ind. App. 215.

There is another well-established rule which sustains the right to injunctive relief in this case. This rule is stated in

1 High, Injunctions (4th ed.) §12, as follows: "The

6. prevention of vexatious litigation and of a multiplicity of suits constitutes a favorite ground for the exercise of the jurisdiction of equity by way of injunction; and it may be laid down as a general rule that whenever the rights of a party aggrieved cannot be protected or enforced in the ordinary course of proceedings at law, except by numerous and expensive suits, a court of equity may properly

interpose and afford relief by injunction.” To the same effect are the following cases: *Owen v. Phillips* (1881), 73 Ind. 284, 294; *Lake Erie, etc., R. Co. v. Young* (1893), 135 Ind. 426, 431, 41 Am. St. 430; *Vandalia Coal Co. v. Lawson* (1909), 43 Ind. App. 226; *Gray v. Foster* (1910), 46 Ind. App. 149; *Stovall v. McCutchen* (1900), 107 Ky. 577-581, 54 S. W. 969, 47 L. R. A. 287, 92 Am. St. 373; *Campbell v. Seaman* (1876), 63 N. Y. 568, 20 Am. Rep. 567; *Lonsdale Co. v. City of Woonsocket* (1899), 21 R. I. 498, 44 Atl. 929.

The fact that we have a statute under which the landowner may proceed to build a fence, affords no ground for an exception to the rule just stated, or for the denial

7. of injunctive relief where the parties have seen fit to enter into a contract fully stating their respective rights and duties.

Here, the remedy at law for violating the contract would be available whenever appellee suffered loss or damage
6. occasioned by the insufficient and defective fence, and the number of such suits would be limited only by the number of such occurrences.

There is another rule applicable in cases of this character. In 4 Pomeroy, Eq. Jurisp. (3d ed.) §1341, it is said: “An injunction restraining the breach of a contract is a
8. negative specific enforcement of that contract. The jurisdiction of equity to grant such injunction is substantially coincident with its jurisdiction to compel a specific performance. Both are governed by the same doctrines and rules; and it may be stated as a general proposition that wherever the contract is one of a class which will be affirmatively specifically enforced, a court of equity will restrain its breach by injunction, if this is the only practical mode of enforcement which its terms permit. * * * The universal test of the jurisdiction, admitted alike by the courts of England and of the United States, is the inadequacy of the legal remedy of damages in the class of contracts to which the particular instance belongs.”

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If the contract in question here is one that can be enforced by specific performance, then it comes within the rule established by the overwhelming weight of authority, that equity will interpose to prevent the violation of a contract that may be so enforced. In some exceptional cases equity will grant relief by injunction, where specific performance of the contract cannot be enforced. To be

9. entitled to enforce a contract by specific performance, it must appear that it is founded on a valuable consideration, is complete and definite in its terms, and fair and just in all its parts. It must be susceptible of being specifically enforced against both parties, without adding to its provisions, and be susceptible of enforcement without hardship to either party. The absence of a legal remedy must appear, or if there be such remedy, it must be shown not to be so plain and adequate, or as practical and efficient to the ends of justice and its prompt administration, as the remedy in equity. 26 Am. and Eng. Ency. Law (2d ed.) 38; *Louisville etc., R. Co. v. Bodenschatz Stone Co.* (1895), 141 Ind. 251-263; *Ikerd v. Beavers* (1886), 106 Ind. 483, 485; *Fairchild v. Dement* (1908), 164 Fed. 200; *McRae v. Smart* (1907), 120 Tenn. 413, 114 S. W. 729.

By the covenants of the deed, which constitute the contract in this case, appellant is bound to construct “a standard fence of woven wire, with barbs on top, sufficient to

10. turn all kinds of stock.” These specifications are so definite and certain as to enable a court to enforce the contract without adding to its terms. If necessary, the rule may be invoked that parol testimony may be heard, not to add to or vary the terms of the contract, but to apply it to its subject-matter. 26 Am. and Eng. Ency. Law (2d ed.) 38; *Colerick v. Hooper* (1852), 3 Ind. 316, 317, 56 Am. Dec. 505; *Tewksbury v. Howard* (1894), 138 Ind. 103, 106; *Cutsinger v. Ballard* (1888), 115 Ind. 93, 95; *Burke v. Mead* (1902), 159 Ind. 252.

In discussing the application of the doctrine of specific

performance, in the celebrated case of *Union Pac. R. Co. v. Chicago, etc., R. Co.* (1896, 163 U. S. 564, 600, 116 Sup. Ct. 1173, 41 L. Ed. 265, Chief Justice Fuller said: "The jurisdiction of courts of equity to decree the specific performance of agreements is of a very ancient date, and rests on the ground of the inadequacy and incompleteness of the remedy at law. Its exercise prevents the intolerable travesty of justice involved in permitting parties to refuse performance of their contracts at pleasure by electing to pay damages for the breach. It is not contended that multiplicity of suits to recover damages for the refusal of defendants to perform would afford adequate relief, nor could it be, for such a remedy under the circumstances would neither be plain nor complete, nor a sufficient substitute for the remedy in equity."

In many cases a person is entitled to his choice of remedies, and the fact that he seeks equitable relief, when he might

have an action at law for damages, is not a suf-

11. ficient answer to the suit in equity. If his application

for equitable relief comes within the established rules in other respects, and such remedy is more complete, adequate and practical in the prompt administration of justice, the writ should not be denied. 26 Am. and Eng. Ency. Law (2d ed.) 20; 4 Pomeroy, Eq. Jurisp. (3d ed.) §1405.

The fact that the writ of injunction, if granted, will not in and of itself afford full and complete relief, is not in all cases sufficient ground for denying the writ, where

12. the party is otherwise entitled to it. If one party to

the contract has fully performed his part of the obligation, and the other is in full enjoyment of the rights secured by the contract, and is attempting to execute his part of the agreement in a manner expressly forbidden by its provisions, or impliedly forbidden by the affirmative requirements resting upon him by virtue thereof, then an injunction may properly issue, forbidding such attempted

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execution. 4 Pomeroy, Eq. Jurisp. (3d ed.) §§1341-1343; *Welty v. Jacobs* (1898), 171 Ill. 624, 631, 49 N. E. 723, 40 L. R. A. 98; Fry, Spec. Perf. (3d Am. ed.) §§836-845, 1120; 26 Am. and Eng. Ency. Law (2d ed.) 29.

While, as a general rule, building contracts will not be specifically enforced because of uncertainty, and of the inherent discretion and special skill required, as well

13. as the impracticability of enforcing the court's decree, yet there are well-recognized exceptions to the general rule, some of which are as follows: (1) Where the structure is of simple design, clearly defined and certain in its requirements. (2) Where the plaintiff has a material interest in the structure not susceptible of adequate compensation in damages. (3) Where the defendant has contracted to erect the structure on land acquired by conveyance from the plaintiff. (4) Where there has been part performance so that the defendant is enjoying the benefits of the contract by the terms of which he is obligated to erect the structure. Fry, Spec. Perf. (3d Am. ed.) §76 and notes; 4 Pomeroy, Eq. Jurisp. (3d ed.) §1402 and notes; Story, Eq. Jurisp. §§727, 728; *Bromberg v. Eugenotto Constr. Co.* (1908), 158 Ala. 323, 48 South. 60, 19 L. R. A. (N. S.) 1175.

In any case, the right to specific performance is a matter of sound judicial discretion, controlled by established principles of equity, and exercised upon consideration of

14. all the circumstances of each particular case. 4 Pomeroy, Eq. Jurisp. (3d ed.) §1404; *Ash v. Daggy* (1855), 6 Ind. 259; *Boldt v. Early* (1904), 33 Ind. App. 434, 104 Am. St. 255; *Ames v. Ames* (1910), 46 Ind. App. 597.

In 4 Pomeroy, Eq. Jurisp. (3d ed.) §1404, it is said: "Where, however, the contract is in writing, is certain in its terms, is for a valuable consideration, is fair and just in all its provisions, and is capable of being enforced without hardships to either party, it is as much a matter of course for a court of equity to decree its specific performance as for a

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court of law to award a judgment for damages for its breach.

• • • The remedy of specific performance is governed by the same rules which control the administration of all other equitable remedies. • • • He who seeks equity must do equity, and he who comes into equity must come with clean hands.”

In 14 Current Law 1960, it is said: “Generally speaking any fair and valid contract may be enforced if property rights are involved, and if the contract is one susceptible of being enforced.”

The fulfilment of the contract before us is a part of the consideration for the conveyance of the right of way enjoyed by appellant. Appellee has fully executed his part 10. of the obligation. The fence is of simple design and clearly defined, and appellee, who has a material interest in its construction, comes with clean hands, demanding equitable relief. The specific performance of the contract could be decreed and enforced without complication, and where this is true, the authorities fully authorize the issuance of the writ of injunction to prevent its violation. 2 High, Injunctions (4th ed.) §1109; *Xenia Real Estate Co. v. Macy* (1897), 147 Ind. 568; *Shubert v. Woodward* (1909), 167 Fed. 47, 53, 92 C. C. A. 509; *Welty v. Jacobs, supra*.

There was abundant evidence from which the court may have concluded that the proposed fence was not a lawful fence, nor such as appellee was bound, by the coven- 15. ants of the deed, to erect. The fact that the deed was to an agent, and no formal acceptance of it by appellant is shown, can make no difference, as appellant was in possession of the right of way, and proceeding to erect a fence that it claims complies with the terms of the deed. It could not accept the benefit derived from the deed, and at the same time ignore its covenants. Assuming to proceed in compliance with the terms of the deed, appellant should not be permitted to erect a fence inferior to the standard set thereby.

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The presumption is in favor of the action of the trial court, and we find no cause for criticism in this case.

16. The motion for a new trial was properly overruled. Judgment affirmed.

PEABODY ALWERT COAL COMPANY v. YANDELL.

[No. 7,145. Filed November 15, 1911.]

1. MASTER AND SERVANT.—*Coal Mines.—Props.—Registering Need thereof.—Complaint.*—In a complaint for personal injuries alleged to have been sustained because of a lack of props for a coal mine in which plaintiff was employed, it is not necessary to allege that the plaintiff registered a request for props on the black-board provided for that purpose. *Muren Coal, etc., Co. v. Cope-land*, 46 Ind. App. 230, followed. p. 616.
2. MASTER AND SERVANT.—*Coal Mines.—Power to Make Roof Secure.—Complaint.—Transfer.*—Whether a complaint by a miner for injuries sustained because of an insecure roof in a coal mine must allege that such roof could have been made safe, is a question the Appellate Court cannot decide where there is an equal division of the judges on such question, and the case will be transferred to the Supreme Court. p. 616.

From Sullivan Circuit Court; *Charles E. Henderson*, Judge.

Action by Era Yandell against the Peabody Alwert Coal Company. From a judgment for plaintiff, defendant appeals. (For final decision, see — Ind. —.) *Transferred to Supreme Court.*

John T. Hays and *Will H. Hays*, for appellant.

J. W. Lindley and *O. B. Harris*, for appellee.

PER CURIAM.—This action was brought by Era Yandell against appellant, under the provisions of the statute regulating coal mines, to recover damages occasioned by the death of her husband, who lost his life while employed in the mines operated by appellant. The trial below resulted in a verdict and judgment in favor of appellee, and the case

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is here on appeal. The complaint apparently proceeds on the theory that the mine boss violated the provisions of the statute by failing properly to inspect the working place of appellee's decedent, to see that it was properly timbered and that the safety of the mine was assured, and to see that a sufficient supply of timbers was on hand at said working place; and that the mine operator violated the provisions of the act by failing to deliver props, caps and timbers at the working place of appellee's decedent, so that he might at all times be able to secure his working place from caving in; and that, by reason of such failure to furnish props, caps and timbers the roof fell upon him, causing his death.

A demurrer was filed to the complaint and overruled, and this ruling is assigned as error. The complaint is assailed

upon two grounds. The first objection urged against

1. it is that it does not aver facts showing that appellee's decedent registered on the blackboard, maintained for that purpose, a request for props and timbers, giving the number required and the lengths, as provided by the act, and that after such request appellant neglected or refused to furnish such timbers. This court is agreed upon the question presented by this objection to the complaint, and is of the opinion that the want of such an averment does not make the complaint insufficient, and that the doctrine announced in the case of *Muren Coal, etc., Co. v. Copeland* (1910), 46 Ind. App. 230, should be followed.

The second ground of objection is that the complaint does not aver facts showing that the roof of the mine, at the place where injury occurred, could have been propped so

2. as to render it secure and prevent the injury, without an unreasonable interference with the work of the mine. It is insisted upon behalf of appellant that the same rule of construction should be applied to the mining act as was applied by the Supreme Court in construing the statute requiring dangerous machinery to be guarded. *Laporte Carriage Co. v. Sullender* (1905), 165 Ind. 290; *Robertson v.*

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Ford (1905), 164 Ind. 538. We are asked to follow and reaffirm the rule announced by this court in the case of *Zeller, McClellan & Co. v. Vinardi* (1908), 42 Ind. App. 232. Upon the question thus presented, it is impossible for this court to agree, three being of the opinion that the rule applied by the Supreme Court in the construction of the factory act should be applied to the act under consideration, while the other three are of the opinion that the rule of construction referred to has been extended quite far enough, and that the case of *Zeller, McClellan & Co. v. Vinardi, supra*, should be as to that part overruled. Other questions are involved in the decision of this case, but as a decision of the question here presented is vital and essential to its determination, the case is ordered transferred to the Supreme Court.

MAIBEN v. MANLOVE ET AL.

[No. 7,991. Filed November 16, 1911.]

1. APPEAL.—*Transcript.—Verity.*—A properly-prepared and duly authenticated transcript imports verity. p. 620.
2. APPEAL.—*Matters in Bar.—How Shown.*—Matters in bar of an appeal may be presented without formal pleadings, by a verified motion to dismiss, and such motion may be resisted by counter-affidavits. p. 621.
3. APPEAL.—*Judgment.—Authority of Attorneys.—Contradicting.*—Where the record shows that attorneys represented defendant and settled his case, his affidavit that they were not authorized will not overthrow the record, where counter-affidavits, as convincing as defendant's, stated that such attorneys were authorized. p. 621.
4. APPEAL.—*Judgment by Agreement.—Contradicting.—Estoppel.*—A judgment for possession and for damages for unlawful detention of real estate, further providing that "in pursuance of the agreement of the parties to this action * * * the writ of ejectment shall not issue under this judgment" until a certain time, affirmatively shows an agreement by the parties to the judgment, and the parties are estopped to prosecute an appeal therefrom after the benefits thereof have been accepted. p. 621.

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5. *Appeal -- Dismissed.*— An appeal from a judgment by agreement will be dismissed. p. 622.

From Cass Circuit Court: *John S. Lairy, Judge.*

Action by May Mahove and others against Walter Maiben. From a judgment for plaintiffs, defendant appeals. *Appeal dismissed.*

Long, Yarbott & Souder, for appellant.

David D. Fickle and David C. Arthur, for appellees.

FELT, P. J.—This was an action by appellees against appellant for possession of real estate, and for damages for the unlawful detention thereof. The answer was a general denial. On October 24, 1910, appellees obtained judgment for possession of the property—a storeroom in the city of Logansport, Indiana—and for \$390 damages. The judgment is in the usual form, except the concluding part thereof, which is as follows: “It is further adjudged by the court, in pursuance of the agreement of the parties to this action, that the writ of ejectment shall not issue under this judgment until January 1, 1911.”

The entry shows that the plaintiffs were present by Fickle & Arthur, their attorneys, and the defendant, by Lairy & Mahoney, his attorneys. On January 4, 1911, execution and a writ of ejectment were issued on the judgment. On January 5, 1911, appellant filed his motion for a new trial as of right, and tendered his undertaking, as by law required. On March 1, 1911, the court overruled the motion for a new trial as of right, and this appeal was prayed and granted.

The question now before us arises on appellee's verified motion to dismiss the appeal. The substance of the motion and the grounds for dismissal are as follows: (1) That there was no actual trial below, and the judgment was taken by compromise and agreement of the parties; (2) that, in pursuance of the agreement, no execution or writ of ejectment was issued until January 4, 1911; (3) that appellant,

with full knowledge of the terms of said agreement and judgment, made payments thereon in the sum of \$325, and remained in the possession of said premises, and continued to use them long after January 1, 1911; (4) that after the rendition of said judgment, and prior to January 1, 1911, appellant frequently asserted his knowledge of the provisions of said judgment, and of the time he was to give possession of the premises, and sought to negotiate a lease thereon from January 1, 1911, but was unable so to do; (5) that the appeal is not in good faith, but is solely for the purpose of enabling appellant to occupy the premises he could not lease.

The motion to dismiss is supported by the affidavit of David C. Arthur, one of the attorneys, and also by one of the appellees.

Appellant has filed his affidavit in opposition to the motion, the substance of which is that he held the premises in question by authority given him by the Logansport Drug Company, a corporation, which held a lease thereon; that some time after July 1, 1910, he learned that the action for possession had been filed; that no summons was served upon him; that said Logansport Drug Company, through its attorneys, Lairy & Mahoney, appeared to said action, and agreed to the judgment without his knowledge or consent; that he did not authorize the attorneys to act for him; that he made no payments on the judgment, but paid his rent to said company, which made any payments that were made on the judgment; that he did not know the judgment was rendered against him until after January 1, 1911; that he admits having conversations in October, November or December, 1910, with attorneys Lairy & Mahoney, with reference to his rights in and to the real estate, but denies any reference in such conversations to the judgment, or knowledge thereof by him at that time; and that his appeal is in good faith.

The affidavit of said Arthur shows that about July, 1910, he was informed by Moses B. Lairy that he was acting as

attorney for appellant, and he thereafter dealt with him as such attorney; that after the suit was filed, and before the judgment was rendered, appellant stated to said Arthur that Lairy & Mahoney were his attorneys, that he was following their directions, and that he (Arthur) should thereafter deal with them; that there was no trial of the action for possession, but the terms of the judgment were fully agreed upon by the attorneys, an entry prepared, submitted to the court and placed of record in the form shown by the transcript; that each party acted upon and received benefits under the judgment, appellees by accepting payments thereon, and appellant by continuing in the undisturbed possession of the premises until after January 1, 1911; that appellant had full knowledge of the rendition and provisions of said judgment, and after the issuance of the execution and writ on January 4, 1911, sought to consult Mr. Mahoney, as his attorney.

The record, in a properly-prepared and duly-authenticated transcript, imports absolute verity upon appeal. *Ferris v. State* (1901), 156 Ind. 224.

Appellant invokes the foregoing proposition to show that there was a trial, and that the judgment in this case was not by agreement, and in so doing says: "We call the court's attention at the outset to the fact that the record shows that appellant filed his answer in general denial to appellees' complaint, that evidence was heard, and that upon this evidence the court rendered the judgment appealed from."

But the record also shows that the very answer upon which appellant relies was filed by his attorneys, Lairy & Mahoney, whose authority he now seeks to question, by matters *dehors* the record. For the purposes of this motion, it is as legitimate to show by evidence outside the record that the judgment entered was by compromise and agreement of the parties, without an actual trial, as to show in the same way that the attorneys who filed the pleadings and prepared the judgment entry were not authorized so to do.

Matter in bar of an appeal may be presented by verified motions to dismiss, and may be resisted by counter-affidavits, without any formal pleadings. Elliott, App. Proc.

2. §§409-414; Ewbank's Manual §231; *Buntin v. Hooper* (1877), 59 Ind. 589; *Day v. School City of Huntington* (1881), 78 Ind. 280; *Louisville, etc., R. Co. v. Boland* (1880), 70 Ind. 595; *Williams v. Richards* (1899), 152 Ind. 528.

The record in this case shows the appearance in the circuit court of the attorneys for both plaintiffs and defendant, and the verified statements outside the record, asserting

3. the complete authority of appellant's attorneys, are equally as strong as those of appellant denying such authority, and, on the facts of this case as disclosed by the record, the verified motion and the affidavits, are far more consistent and convincing. Appellant admits knowledge of the suit, and conversations with the attorneys of record on the subject of the possession of the property, which was also the subject-matter of the suit. In fact, considering the record and the affidavits, the conclusion is irresistible, that the denial of the authority of appellant's attorneys in the case below is an afterthought, born of the exigencies of his need of occupying the premises.

Where there is such a conflict in the affidavits as appears here upon the question of the authority of the attorneys for appellant in the action below, we are not required to reconcile the conflict, but are fully warranted in adhering to the record as it appears in the transcript. *Louisville, etc., R. Co. v. Boland, supra*; *Justice v. Justice* (1888), 115 Ind. 201.

Appellant does not deny that the judgment was the result of a compromise and agreement, but says the attorneys were not authorized to make such an agreement for him.

4. The showing made is wholly insufficient to warrant us in concurring in this conclusion, and we are fully convinced that there is no merit in appellant's contention.

Aside from the affidavits, the record, as before shown,

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states that there was an agreement of the parties, but does not set it out, except in respect to the delay in issuing an execution or the writ of ejectment. This is conclusive that there was an agreement, and the part set out in the judgment is wholly beneficial to appellant. After making an agreement and accepting benefits derived therefrom, appellant is in no position to disregard it or to split it up and accept the part that is beneficial and reject that which does not now serve his purpose of securing a new trial as a matter of right.

Where a judgment is entered by consent, or by compromise and agreement of the parties, and the court has jurisdiction of the subject-matter, the parties are estopped from denying the validity of the judgment, and from prosecuting an appeal on account of any errors in the proceedings or judgment. *Board, etc., v. Clark* (1909), 43 Ind. App. 499; *Princeton Coal, etc., Co. v. Gilmore* (1908), 170 Ind. 366; *Ewing v. Ewing* (1903), 161 Ind. 484; *Indianapolis, etc., R. Co. v. Sands* (1892), 133 Ind. 433, 438.

It is an established principle of our law, that a party cannot prosecute an appeal, and thereby seek to reverse a judgment, the benefits of which he has voluntarily and knowingly accepted. Such acceptance of benefits waives any errors otherwise available, and estops him from procuring a reversal of the judgment. *Sonntag v. Klee* (1897), 148 Ind. 536; *McGrew v. Grayston* (1896), 144 Ind. 165; *Williams v. Richards* (1900), 152 Ind. 528; *Sterne v. Vert* (1886), 108 Ind. 232; Ewbank's Manual §§112, 113.

In this case, on the showing made, we conclude that the judgment was entered by the agreement of the parties, duly authorized, and that such agreement is shown by the record as well as by the motion to dismiss, and that appellant has accepted the benefits of the judgment, by remaining

5. in possession of the premises in pursuance of the agreement of the parties and the judgment of the court.

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The motion of appellees is therefore sustained and the appeal dismissed.

Lairy, C. J., not participating.

SHERMAN v. INDIANAPOLIS TRACTION AND TERMINAL COMPANY.

[No. 7,358. Filed November 17, 1911.]

1. CARRIERS. — *Interurban Railroads. — Instructions. — Burden of Proof.*—To “Satisfaction” of Jury.—An instruction, in a personal injury case, that the burden is on the plaintiff to establish by a preponderance of the evidence to the “satisfaction” of the jury the material allegations of his complaint, should be refused; but the giving thereof does not constitute reversible error, where the other instructions clearly define what is meant by a preponderance of the evidence. p. 624.
2. CARRIERS.—*Passengers.—Injuries.—Aggravating Sickness.—Instructions.*—In an action by a passenger for personal injuries, an instruction that if the plaintiff on the day he sustained the injury complained of contracted ptomaine poisoning, resulting in colitis and other ailments, and that his pain and suffering resulting therefrom was indistinguishably intermingled with the pain and suffering from the alleged injuries proximately caused by defendant interurban railroad company's negligence, he cannot recover from defendant, is bad under any state of the evidence on the question of negligence. pp. 627, 629.
3. CARRIERS.—*Negligence.—Damages.—Burden of Proof.*—The burden is on plaintiff to show that the injury received, or the pain suffered, was due in whole, or in part, to defendant's negligence; but where plaintiff was suffering from disease at the time of the injury, it is not necessary for him to show how much he would have suffered from the disease if he had not received the injury, such pain from sickness, or other cause, being matter in mitigation to be shown by defendant. pp. 628, 632.
4. NEGLIGENCE.—*Concurrent.—Liability.*—Where plaintiff's injuries were caused by the concurrent or successive negligence of two or more persons, one of such persons, when sued alone, cannot escape liability on the ground that the results of the injuries from others cannot be apportioned under the evidence. p. 629.
5. APPEAL.—*Omission of Evidence.—Instructions.—Presumptions.*—The presumption that a questioned instruction given, was supported by the evidence, where the evidence is not in the record,

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does not apply, where the instruction would be erroneous under any evidence within the issues. pp. 630, 631.

6. APPEAL.—*Presumptions.—Erroneous Rulings.—When Reversible.*—The presumption is that the rulings of the trial court were correct; but where erroneous rulings are affirmatively shown by the record, so material and influential as naturally to influence the result prejudicially to appellant, the judgment should be reversed, unless the appellee can show affirmatively from the record that such rulings were harmless. p. 630.

From Hendricks Circuit Court; *James L. Clark*, Judge.

Action by Charles H. H. Sherman against the Indianapolis Traction and Terminal Company. From a judgment for defendant, plaintiff appeals. *Reversed.*

Wymond J. Beckett, for appellant.

F. Winter, W. H. Latta and Brill & Harvey, for appellee.

LAIRY, C. J.—This action was brought by appellant to recover damages for personal injuries, which he alleges were received by him while alighting from one of appellee's street cars in the city of Indianapolis, upon which he had been riding as a passenger.

The complaint was in one paragraph, to which the appellee filed an answer of general denial and also an answer setting up the two-year statute of limitations. Appellant filed a reply in general denial to the second paragraph of answer, and upon the issues so formed the cause was submitted to a jury for trial. A general verdict was returned in favor of appellee, and appellant filed a motion for a new trial, which was overruled, and judgment was rendered for appellee. The only error assigned for reversal is the overruling of appellant's motion for a new trial.

The only question presented by this appeal is the alleged error of the trial court in giving to the jury instructions one, two and three, requested by appellee. The first

1. instruction complained of is as follows:—“In an action like the one you are trying, the burden is upon the plaintiff to establish by evidence to your satisfaction not only that the agents, servants and employes of the defendant

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street-car company were negligent in manner and form, as charged in his complaint, but before he can recover for any ailment or injury from which he is now suffering, or has suffered, he must show to your satisfaction, by a fair preponderance of all the evidence in the case, that such ailment and suffering are the direct and proximate result of the negligence of defendant, its agents, servants and employes, as charged in the complaint, and it is not sufficient to warrant you in returning a verdict in favor of plaintiff, that he enshroud the source of such suffering and ailment, if any he has, in doubt or mystery, but the evidence must be such as to create an honest conviction in your minds as to the truth of the proposition sought to be established, and that such ailment or suffering is the direct or proximate result of the negligence of defendant's agents, servants and employes, as alleged in the complaint, and does not result from any other cause."

This instruction informed the jury that the burden was upon plaintiff to establish by evidence, to the satisfaction of the jury, the material averments of his complaint. The law requires the plaintiff to prove the material averments of his complaint by a fair preponderance of the evidence, and the claim of appellant is that this instruction requires a higher degree of proof than the law exacts. The form of expression used in this instruction is not to be commended, and has been expressly condemned by the supreme court of Illinois, in the case of *Mitchell v. Hindman* (1894), 150 Ill. 538, 37 N. E. 916. In that case it appears that an instruction, that stated that plaintiff was "bound to prove to the satisfaction of the jury by a clear preponderance of the evidence," etc., had been requested and refused by the trial court. It was held on appeal that the instruction was erroneous, and that it was properly refused. The language used in the instruction under consideration is not identical with that condemned in the Illinois case, but it is sufficiently

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objectionable to justify the trial court in refusing it. An instruction may contain such an inaccurate statement of the law as would warrant the trial court in refusing to give it, and still the objection may not be so serious as to warrant a reversal of a judgment on that account. In this case the trial court could very properly have refused to give said instruction, and such a ruling would have been commendable; but having given the instruction, this court is now required to determine whether the language employed, when considered in connection with the other instructions given, was such as would probably mislead the jury to the prejudice of appellant. This court has decided repeatedly that an instruction that, in substance, informs the jury that a party having the burden of proof as to a certain fact or issue must establish it to the satisfaction of the jury by a fair preponderance of the evidence is not reversible error, where the other instructions in the case clearly define what is meant by a preponderance of the evidence, and distinctly advise the jury that a preponderance of the evidence will be sufficient to justify a finding in favor of the party having the burden. In such cases it is held that the words "to the satisfaction of the jury" are equivalent to "find" or "believe." *Terre Haute Traction, etc., Co. v. Payne* (1910), 45 Ind. App. 132; *Baltimore, etc., R. Co. v. Walker* (1908), 41 Ind. App. 588; *Sams, etc., Car Coupler Co. v. League* (1898), 25 Colo. 129, 54 Pac. 642; *Callam & Co. v. Hanson* (1892), 86 Iowa 420, 53 N. W. 282; *Stewart v. Outhwaite* (1897), 141 Mo. 562, 44 S. W. 326.

In the third instruction, given at the request of plaintiff, the court told the jury that the issues were to be determined by a preponderance of the evidence, and also informed the jury what was meant by said term. In other instructions the jury was repeatedly told that if certain facts were proved by a preponderance of the evidence, it should find such facts by the verdict. While we do not approve of the form of expression used in this instruction to indicate the degree of proof

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required to establish a fact in favor of the party having the burden, still, in view of the other instructions given, we do not think that the jury could have been misled.

The second instruction given at the request of appellee is as follows: "If you find from the evidence in this case that

on March 25, 1905, the day plaintiff claims to have

2. been injured, that he (plaintiff) ate some canned fish, and as a result thereof became poisoned, and had what is known as 'ptomaine poisoning,' and that his bowels became affected and diseased as a result thereof, and he had colitis and other ailments as a consequence thereof, and his pain and suffering resulting from said condition are so intermingled with any pain and suffering caused from being thrown from a street car, as alleged in his complaint, if you find from the evidence that he was so thrown from said car, and you are unable, from the evidence, to separate the damages and pain and suffering caused by the ptomaine poisoning from the damages, pain and suffering caused from being so thrown from said car, then I instruct you that plaintiff cannot recover for such damages and pain and suffering."

The effect of this instruction was to inform the jury that if it found that plaintiff was injured by reason of defendant's negligence, as alleged in the complaint, and suffered pain by reason thereof, and if it further found that he was, at the time, suffering injury and pain as a result of ptomaine poisoning, then it would be incumbent upon plaintiff to prove what part of the damages and suffering was due to the negligent injury and what part was due to the disease; and if, from the evidence, the jury was unable to determine the extent of the damages and suffering that were due to the injury complained of, as distinguished from such damages and suffering as were due to the disease, then there could be no recovery for such damages and suffering.

We do not think that this instruction correctly states the law. The application of such an instruction would relieve a defendant from the obligation to pay damages that were

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found by the jury to be the direct and proximate result of its negligence. Where a person is injured by the negligence of another, the pain and suffering caused by such injury is a legitimate element of damages. By this instruction the jury was told that even though the plaintiff did suffer pain as a result of being thrown from said street car, this cannot be considered as an element of damage, if he was at the same time suffering pain as a result of ptomaine poisoning, and the pain resulting from the disease and that from the injury were so intermingled that the jury was unable to say what part was due to the negligence of defendant and what part to the disease. If the pain and suffering manifested by plaintiff was of such character as to seem to be entirely due to ptomaine poisoning, then it would be for the jury to decide whether any part of it resulted from the fall from the street car, and if the evidence on this question was so equally divided that the jury was unable to determine whether the pain and suffering manifested resulted entirely from the disease, or whether due in part to said injury, then such pain and suffering could not be considered as an element of

damage. The burden is on the plaintiff to prove that

3. the pain suffered is due, either in whole or in part, to the negligence of defendant; but when it is established that his suffering is due to such negligent injury, it is not necessary that he go further and prove just how much he would have suffered from the disease if he had not received the injury.

In such a case, defendant has a right to offer evidence that plaintiff was suffering from a disease, and to prove the character and extent of the pain that would probably result from such disease, and to have this evidence considered by the jury in mitigation of damages; but it has no right entirely to escape the payment of damages for pain and suffering which its negligence has partly caused.

In cases where it appeared that the plaintiff was suffering

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from a disease at the time he received the injury complained of, and that the effect of such injury was to aggravate

2. such disease, the courts have uniformly held that the defendant cannot escape liability for such injury, on the ground that the damage resulting from the disease and the damage resulting from the injury cannot be apportioned under the evidence. *Louisville, etc., R. Co. v. Falvey* (1886), 104 Ind. 409, and cases cited. The same doctrine has been applied in cases where it appeared that a disease was latent, and that the injury had developed such latent disease. *Crane Elevator Co. v. Lippert* (1894), 63 Fed. 942, 11 C. C. A. 521; *St. Louis, etc., R. Co. v. Lewis* (1909), 91 Ark. 343, 121 S. W. 268.

It has also been held that where an injury to a plaintiff is due to the concurrent or successive negligence of two per-

sons, one of such persons, when sued alone, cannot

4. escape liability because the damage that resulted from his negligence, and that resulting from the negligence of the wrongdoer, cannot be apportioned under the evidence. *Webster v. Hudson River R. Co.* (1868), 38 N. Y. 260; *Slater v. Mersereau* (1876), 64 N. Y. 138; *Ehrgott v. Mayor, etc.* (1884), 96 N. Y. 264, 48 Am. Rep. 622.

In the case of *Louisville, etc., R. Co. v. Falvey, supra*, our Supreme Court cites with approval the case last cited and quotes from the opinion the following language: "It was certainly impossible for the plaintiff to prove, or for the jury to find how much of the injury was due to either cause alone. It was wholly impossible to apportion the damage between the two causes. Shall this difficulty deprive the plaintiff of all remedy? We answer no. The wrong of the defendant placed the plaintiff in this dilemma, and it cannot complain if it is held for the entire damage."

The cases cited as authority for this decision are not, in all respects, identical with the case at bar; but the analogy is so close that we have no hesitancy in applying to the decision of this case the principles that have been announced

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and applied in the cases to which we have referred. The same reasoning by which the results were reached in the cases cited will lead to a like result in this case.

The third instruction, given at the request of appellee, is open to the same objections as the one we have just discussed, and for that reason we need not consider it separately.

5. Both instructions were erroneous under any conceivable state of the evidence. Where the evidence is not in the record, it is well settled that an instruction will not be held erroneous, where it is proper under any evidence that might have been properly admitted within the issues; but where an instruction is given which would be improper under any conceivable state of the evidence, such instruction will be held erroneous, although the evidence is not in the record. *Drinkout v. Eagle Machine Works* (1883), 90 Ind. 423; *Reinhold v. State* (1892), 130 Ind. 467; *Weir Plow Co. v. Walmsley* (1887), 110 Ind. 242; *Joseph v. Mather* (1887), 110 Ind. 114; *Tipton v. Schuler* (1900), 87 Ill. App. 517.

Appellee urges that the apparent error in these instructions may have been rendered harmless by the evidence, or possibly by answer to interrogatories that affirma-

6. tively show that the verdict was based upon the second paragraph of answer setting up the statute of limitations as a defense, or upon the fact that defendant was not guilty of the negligence charged, or upon the contributory negligence of the plaintiff. It is further insisted that, as the entire record is not before us, this court has no means of knowing that the error in these instructions was not cured in the manner suggested, and thereby shown to have had no influence upon the verdict. As a result of this argument we are asked to hold that the error in giving these instructions was harmless, because the record before us does not affirmatively show that such error was not cured.

We cannot go to the extent insisted upon by appellee. It is true that the rulings and judgment of the trial court are

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presumed to be correct, and this presumption is indulged until it is overcome by the record that appellant brings to this court, that affirmatively shows error on its face that was so material and influential that it naturally would, and probably did, influence the result reached by the trial court, in a manner prejudicial to appellant. When this is made to appear, the error will be deemed prejudicial, and the judgment will be reversed, unless it affirmatively appears that the error did not influence the result. Elliott, App. Proc. §§593, 594; *Houk v. Allen* (1891), 126 Ind. 568; *Harter v. Eltzroth* (1887), 111 Ind. 159; *Cline v. Lindsey* (1887), 110 Ind. 337.

Some courts hold that where the record discloses an error, it will be presumed to be prejudicial to the party against whom it was committed. *Bindbeutel v. Street R. Co.* (1891), 43 Mo. App. 463; *Tipton v. Schuler*, *supra*.

We do not go to the extent of holding that every error shown by the record will be presumed to be prejudicial; but we do hold that where the error shown by the record was of such a material and substantial nature that it naturally would, and probably did, influence the result prejudicially to the party complaining, a *prima facie* case of error is made out. In order to overcome this *prima facie* case, it must appear affirmatively from the record that the error has been cured or rendered harmless.

This appeal was apparently taken under the provisions of §691 Burns 1908, §650 R. S. 1881. The part of this section

that applies is as follows: "Provided, that when in

5. any case an appeal is prosecuted upon the correctness of instructions given or refused, or the modifications thereof, it shall not be necessary to set out in the record all the evidence given in the cause, but it shall be sufficient in the bill of exceptions to set out the instructions or modifications excepted to, with a recital of the fact that the same were applicable to the evidence in the cause." The evident purpose of this statute was to provide a means by which the question of the correctness of instructions given or refused

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could be presented to this court without including in the record the evidence given in the cause. To hold that errors in instructions are presumed to be cured by the evidence unless the evidence appears in the record, would have the effect of requiring the evidence to be incorporated in the record in every case where the correctness of instructions given is questioned in this court. If this were not done, the presumption would prevail that errors shown in such instructions had been cured. Such a holding would render the provisions of this statute nugatory. In the case of *Tipton v. Schuler, supra*, the court said: "If, as a matter of fact, the erroneous instruction complained of was not harmful by reason of matters appearing in proof, the appellee or defendant in error should have insisted upon the bill of exceptions reciting the evidence before it was signed." It is not necessary to decide in this case whether the remedy suggested by the court in the case quoted from would have been available to appellee. It is enough to say that if no such remedy is provided, it is the fault of the statute and not the fault of the court.

Instructions two and three, given at the request of appellee, were both erroneous, for the reasons heretofore stated.

It was material under the issues in this case that

3. appellant should prove substantial damages. These instructions related to the elements that might be considered by the jury in assessing damages in favor of appellant, and announced an erroneous proposition of law relating thereto. In applying these instructions to the evidence, we can well understand how the jury may have been unable to find that appellant sustained any substantial damage as a result of falling from the car. The jury may have believed from the evidence that a part of the damage suffered by plaintiff was so caused, but may have been unable to return a verdict in his favor for such damages, because, acting under the instructions, it was impossible to separate the damages that resulted from the fall from those that

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resulted from ptomaine poisoning referred to in the instructions.

These instructions were applicable to a material issue in the case, and were of such a character that they naturally would and most probably did influence the jury prejudicially to appellant. The record therefore discloses harmful error for which the judgment must be reversed.

Judgment reversed, with instructions to grant a new trial.

FORT WAYNE AND WABASH VALLEY TRACTION COMPANY v. MILLER.

[No. 7,333. Filed November 17, 1911.]

1. RAILROADS.—*Use of Streets.—Frightening Horses.—Last Clear Chance.—Complaint.*—A complaint alleging that the plaintiff was driving his horse along a street, that the defendant's interurban car approached from the rear at an excessive speed, making unusual and unnecessary noises, frightening plaintiff's horse, which was gentle and safe and which was driven in a careful manner, that defendant's servants could have seen that plaintiff's position was perilous, and that he could not escape, that defendant negligently continued its reckless speed, and blowing its whistle, in an endeavor to pass him, knowing that the horse was running away, to plaintiff's damage, is sufficient. p. 635.
2. NEGLIGENCE. — *Contributory. — Negating. — Complaint.* — Since 1899 (Acts 1899 p. 58, §362 Burns 1908) it is not necessary, in a complaint for personal injuries, to negative contributory negligence, a complaint, otherwise good, being sufficient where it does not affirmatively show such negligence. p. 638.
3. RAILROADS.—*Running down Travelers.—Wilful Injuries.—Complaint.*—A complaint alleging that the plaintiff was driving along a street, that the defendant's car approached from the rear at an excessive speed, causing unusual noises and frightening plaintiff's horse, that defendant's servants saw plaintiff's plight and wilfully and maliciously sounded the whistle, causing such horse to run away, that they then purposely and maliciously pursued said horse in order to frighten it still more, that they knew the plaintiff could not stop the horse nor extricate himself from the danger, that, seeing the horse plunge and rear, they continued maliciously to sound the whistle intending to cause the horse to continue to run away, to plaintiff's damage, shows a wilful injury. p. 638.

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4. APPEAL.—*Briefs.*—*Waiver.*—Points not discussed are waived. p. 640.
5. RAILROADS.—*Running down Travelers.*—*Noises.*—*Frightening Horses.*—*Evidence.*—In an action by a traveler for injuries sustained because of the approach of defendant's car and of unusual and unnecessary noises made, thereby frightening plaintiff's horse and causing it to run away, it is not necessary for the plaintiff to show that such operation or noises were not necessary nor usual at other times, or under other circumstances. p. 641.
6. RAILROADS.—*Speed.*—*Nonexperts.*—*Evidence.*—Nonexperts are competent to testify as to the speed of a train. p. 641.

From Allen Circuit Court; *E. O'Rourke*, Judge.

Action by Sebastian Miller against the Fort Wayne and Wabash Valley Traction Company. From a judgment for plaintiff, defendant appeals. *Affirmed.*

Barrett & Morris, for appellant.

Harper & Eggeman and *Leonard & Townsend*, for appellee.

HOTTEL, J.—This was an action for damages on account of personal injuries received by appellee in a runaway, alleged to have been caused by the negligent operation of one of appellant's interurban cars.

Appellee filed three paragraphs of complaint, but dismissed the first of these, and proceeded upon the other two, to each of which a demurrer was overruled and exception given to appellant. The case was put at issue by an answer in general denial, and upon a trial the jury returned a general verdict for plaintiff for \$5,000, with its answers to interrogatories. Appellee remitted \$1,000 from this verdict, and the court rendered judgment in his favor for \$4,000. A motion for a new trial was overruled.

The errors assigned and relied on are the rulings of the court on the demurrers to the second and third paragraphs of complaint, and on the motion for new trial.

Appellant urges that the second paragraph of the complaint is insufficient for the following reasons: It fails to

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aver (1) "either specifically or in equivalent terms
1. that the objects or acts done by appellant had a
tendency to or were likely to frighten a horse of ordi-
nary gentleness; (2) "that appellee's horse was a horse of
ordinary gentleness;" (3) that the noises were not "inci-
dental to the use of appellant's interurban cars on the high-
way described in the complaint," and "were not necessary
to the proper and safe operation of said car, or related to
the traveling public, or to persons driving horses * * *
of ordinary gentleness."

In answer to the first objection it is sufficient to say that the allegations of the complaint show that the operation of appellant's car did in fact cause appellee's horse to become frightened; that said horse, when it became so frightened, was being driven, hitched to a covered buggy with the top up, in which appellee and his daughter were being conveyed along one of the much-used public streets in the city of Fort Wayne, running north and south through a populous part of said city; that appellant's interurban tracks, which were double, occupied the center of said street, leaving a very narrow space on each side thereof, between the outer rails and the sidewalk, "affording barely sufficient room for an interurban car to pass a buggy;" that appellee's horse, when it became frightened, was being driven in said narrow space on the west side of said street, in a southerly direction; that for a quarter of a mile or more said horse was in view of the operators of appellant's said car, which was approaching from the rear at "the excessive rate of speed of about thirty miles an hour," which excessive speed created unusual and unnecessary noises, causing said horse, which was "city broke and gentle, and had been driven around street-cars, interurban cars and railroad trains with perfect safety," and was then being driven by appellee "in a prudent and careful manner," and was "under complete control," to become frightened; that appellant's servants operating said car were so situated that they could and should have seen that said

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horse was so frightened, and that appellee's situation was a dangerous and perilous one, and that his situation was such that he could not escape from appellant's car; that under such circumstances appellant's servants gave no heed to appellee's perilous position, but carelessly and negligently continued the reckless speed of said car, and carelessly, unnecessarily and negligently, and without any regard whatever to the safety of said appellee and his daughter, blew the whistle, which gave forth such a very loud and piercing noise that appellee's horse became so frightened that he lost control of it; that the operator of said car, although he knew, or could have known, that said appellee was losing control of said horse, and that said horse was running away, unnecessarily, carelessly and negligently continued to blow the whistle and increase the speed of said car in his endeavor to pass appellee, and pursued him 400 feet, and finally passed said horse at a time when it was running away and appellee had lost control over it; that said operator, by the exercise of ordinary care, could have known that said horse was running away, and that if he continued to blow the whistle and pursue said horse down the street serious injury would result to appellee.

We have indicated enough of the substance of this paragraph of the complaint to show that it is entirely sufficient under a very recent holding of the Supreme Court.

Appellant's objections to this paragraph of complaint would indicate that it mistakes the theory upon which such paragraph proceeds. While this paragraph alleges that appellant, by the operation of its car in the manner charged, caused appellee's horse to take fright, its theory is that appellant caused the horse to take fright at a time and place, and under such circumstances, as to put appellee in imminent peril from which he could not extricate himself, and that, seeing and knowing appellee's perilous situation, appellant carelessly, negligently and unnecessarily so operated its

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car as to increase such peril, and thereby caused the horse to run away, with the resulting injuries to appellee. This is actionable negligence. *Effinger v. Fort Wayne, etc., Traction Co.* (1911), 175 Ind. 175; *Indianapolis Union R. Co. v. Boettcher* (1892), 131 Ind. 82; *Louisville, etc., R. Co. v. Stanger* (1893), 7 Ind. App. 179, 195; *Lake Erie, etc., R. Co. v. Juday* (1898), 19 Ind. App. 436; *Kentucky, etc., Bridge Co. v. Montgomery* (1902), 139 Ky. 574, 67 S. W. 1008, 51 L. R. A. 781.

The case of *Effinger v. Fort Wayne, etc., Traction Co.*, *supra*, is especially applicable to this case, and is decisive of the question of the sufficiency of the paragraph in question as against all the objections urged against it.

Appellee does not question appellant's right to run its cars over the highway, or to make such noises as are necessary, usual and incidental thereto, but bases his complaint upon a negligent and wilful misuse of those rights at a time when appellee's perilous situation must have been evident to the operator of the car, and when such misuse might reasonably be expected to increase appellee's danger.

In the case of *Effinger v. Fort Wayne, etc., Traction Co.*, *supra*, the Supreme Court said: "It is not sought in this complaint to charge defendant with negligence in the first instance, by reason of either the speed of the car or its appearance, but the theory of the pleading is that plaintiff was in a situation of imminent peril, and defendant, with full knowledge of the situation, increased that peril, and thereby caused the injury. It may be stated as a general rule, that when one sees another in imminent peril from which he cannot extricate himself, it is the duty of the former so to act as not to increase the peril, and if he does act in a manner to increase the danger after knowledge thereof, he is guilty of negligence."

In the same case the following is quoted with approval from *Culp v. Atchison, etc., R. Co.* (1887), 17 Kan. 475:

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“That a party has a right to do a given act at certain times and under certain circumstances, does not prove that the same act is right under all circumstances, and at all times.”

In support of its contention that the complaint is defective in failing to aver that appellee's horse was a horse of ordinary gentleness, appellant cites *Shrum v. Board, etc.*

2. (1895), 13 Ind. App. 588, 592. The complaint in the case at bar is sufficient, even under that authority, on the subject of appellee's contributory negligence, in that it negatives the existence of such negligence; but since the act of 1899 (Acts 1899 p. 58, §362 Burns 1908) it is only necessary that a complaint for personal injury shall not affirmatively show contributory negligence. *Southern R. Co. v. Davis* (1905), 34 Ind. App. 377; *Greenawaldt v. Lake Shore, etc., R. Co.* (1905), 165 Ind. 219; *Van Winkle v. New York, etc., R. Co.* (1905), 34 Ind. App. 476.

Appellant insists that the third paragraph of complaint is insufficient because the averment as to wilfulness is too narrow; that to make the complaint good it was necessary for appellee “to aver that the injurious acts alleged in the complaint were purposely or intentionally committed, with the intent wilfully and purposely to inflict the injuries of which appellee complained.

The third paragraph sets out the same facts alleged in the second, but proceeds upon the theory that the agents of appellant purposely, maliciously and wilfully operated

3. the car in the manner set out, and alleges that “although the servants of said defendant knew that the horse was frightened by reason of the approach of said car, said car did not slacken its speed, but continued to approach said plaintiff in the same rapid manner, * * * and when said car had almost overtaken said plaintiff, going at the rate aforesaid, and although his said horse was so frightened, and while plaintiff was attempting to control, manage and direct said horse, said agents and servants of said defendant, acting in the line of their duty, * * * pur-

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posely, wilfully and maliciously, and for the purpose of frightening plaintiff's horse, caused the whistle upon said car to blow suddenly, and in a loud, unusual and shrill tone, which caused plaintiff's horse to become much more frightened, and said horse plunged and started to run away, and the operator of said car then purposely, maliciously and wilfully, and for the purpose and with the intent of still more frightening plaintiff's horse, which was then running away, pursued said horse * * * down the street * * * for a distance of 400 feet, at which time the operator of said car had so unnecessarily, purposely and wilfully increased the speed thereof that he passed said plaintiff's horse, although said horse was * * * running away, and said plaintiff had lost complete control of him, all of which the servants of said defendant well knew, and knew also that plaintiff could not escape or avoid the injury or danger threatened; that defendant's said servants did thereby purposely, wilfully and maliciously cause plaintiff's horse to become greatly frightened, and caused him to rear and plunge and run away with plaintiff, and to become unmanageable and uncontrollable; that all of said time plaintiff and his said horse were near said interurban car, and in plain view of defendant's said agents and servants, and that while plaintiff's said horse was * * * rearing, plunging and running away, which said agents and servants of defendants plainly saw and well knew, they * * * purposely, wilfully and maliciously continued to blow the whistle on said car, and purposely, maliciously and wilfully continued to make said whistle on said car * * * sound in an unusual, loud, unnecessary and piercing manner, * * * and purposely, maliciously and wilfully continued to pursue and chase plaintiff's horse while it was so running away, thereby wilfully intending to frighten plaintiff's said horse, and wilfully intending to cause plaintiff's said horse to run away, well knowing that plaintiff was unable to control or manage said horse, and avoid the injuries hereinafter alleged; * * * that

all of said injuries were due wholly and solely to the wilful and malicious acts of the agents of said defendants as aforesaid, they at said time well knowing that their said acts aforesaid would frighten said plaintiff's horse and cause it to run away, and at said time well knew that plaintiff would lose and had lost control of his said horse, and would be and was unable to avoid the threatened danger and injuries aforesaid."

The cases of *Gregory v. Cleveland, etc., R. Co.* (1887), 112 Ind. 385, and *Union Traction Co. v. Lowe* (1903), 31 Ind. App. 336, are cited by appellant in support of its contention as to the insufficiency of this paragraph, but the requirements of said cases seem to be met by appellee's allegation that appellant's servants "maliciously and wilfully continued to pursue and chase plaintiff's horse while it was so running away, thereby wilfully intending to frighten plaintiff's said horse, and wilfully intending to cause plaintiff's said horse to run away, well knowing that plaintiff was unable to control or manage said horse and avoid the injuries hereinafter alleged."

The motion for a new trial contains twenty grounds therefor, but all of these except the first, second, third, fourteenth, fifteenth and seventeenth have been specifically waived

4. by appellant, and of these the first has been waived by failure to present it in appellant's brief. The second is not a proper ground for a new trial, but is properly presented by the third, and grounds fourteen, fifteen and seventeen involve the same question, so that but two reasons need be considered, viz., (3) the verdict is not sustained by sufficient evidence, and (17) error of law occurring on said trial in this: that the court erred in permitting plaintiff's counsel to ask and plaintiff's witness, on examination-in-chief, to answer the following question: "Mr. Greer, in your judgment, how fast was that car going at the time it passed your house? A. In my opinion the car was running from fifteen to twenty miles an hour."

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Appellant contends that the evidence is insufficient to sustain the verdict, for the following reasons: (1) There was no proof that the noises and speed, described in the complaint, were not necessary to the operation of appellant's car. (2) There was no proof that the noises complained of and alleged to have been made by appellant's employes in the operation of its car, were not necessary and usual to the operation of such car.

There was proof tending to show that the manner of operating appellant's car, and the noises made, were not necessary or usual at the particular time and under the circumstances.

Under the theory of appellee's complaint, proof that such operation or noises were not necessary nor usual at other times and under other circumstances was not required.

5. What we have said in the discussion of the sufficiency of the complaint applies with equal force to this objection to the sufficiency of the evidence.

The only case cited by appellant in support of its contention that the court erred in admitting the evidence of witnesses Felts and Greer, is that of *Wright v. Crane*

6. (1905), 142 Mich. 508, 106 N. W. 71, in which it was held that "an estimate of speed should have as a basis at least a reasonable opportunity to judge." The court also said in the same case: "It is so obvious that this witness was not in a position to estimate the speed of this vehicle that we feel constrained to hold that it was error to admit this testimony. Nor are we able to say that it was error without prejudice. There was a sharp dispute on the facts, and any testimony showing a reckless rate of speed was well calculated to turn the scale in favor of the plaintiff."

Each witness testified that he saw the car—Felts, as it passed him, and Greer, from a window in his residence.

"A nonexpert witness may give an opinion as to the speed at which the train was moving. Possibly the testimony of a

nonexpert may be of less value than that of an expert, but that proves nothing to the purpose, for here the question is whether the evidence should be heard, not what weight should be assigned to it." *Louisville, etc., R. Co. v. Hendricks* (1891), 128 Ind. 462, 463. To the same effect are the following cases: *Evansville, etc., R. Co. v. Crist* (1889), 116 Ind. 446, 457, 2 L. R. A. 450, 9 Am. St. 865; *Louisville, etc., R. Co. v. Jones* (1886), 108 Ind. 551, 566; *Guggenheim v. Lake Shore, etc., R. Co.* (1887), 66 Mich. 150, 155, 33 N. W. 161; *Detroit, etc., R. Co. v. Van Steinburg* (1868), 17 Mich. 99, 101; *Pence v. Chicago, etc., R. Co.* (1890), 79 Iowa 389, 397, 44 N. W. 686.

We have considered all the errors assigned and presented by appellant, and are of the opinion that each of the rulings called in question was correct, and that the judgment of the court below should be affirmed.

Judgment affirmed.

MESKER v. LEONARD.

[No. 7,299. Filed November 17, 1911.]

1. **PLEADING.—Complaint.—Theory.—Variance.—Appeal.**—Where the first part of the complaint in a case proceeded upon one theory and the latter part upon another, and there was a variance between the pleading and the evidence, a reversal of a judgment for the plaintiff will be ordered on appeal. p. 643.
2. **TRIAL.—Instructions.—Damages.—Considering All the Evidence.—Appcal.—Briefs.**—An instruction, in an action for damages, that the jury in estimating the damages "has the right to take into consideration all the facts and circumstances proved by the evidence," constitutes reversible error, where the appellant's brief points out evidence admitted on other points, liable to prejudice the jury when estimating the damages. p. 644.
3. **MASTER AND SERVANT.—Defective Valves.—Fall of Hammer.—Evidence.**—Where the complaint alleged that the valve designed to hold the air, by the force of which the hammer was held up until released by a lever, was old and allowed the air to escape into the cylinder, which pressure allowed the hammer to fall, to plaintiff's damage, evidence that such hammer would fall by its

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own weight upon opening the valve and that it was held in position by compressed air, and that the valve permitted air to leak into the cylinder, does not support the complaint, since the leaking of air into the cylinder would cause the hammer to stay up, rather than cause it to fall. p. 646.

From Gibson Circuit Court; *O. M. Welborn*, Judge.

Action by Erastus Leonard against George L. Mesker. From a judgment for plaintiff, defendant appeals. *Reversed*.

Elmer E. Stevenson and Iglehart, Taylor & Heilman, for appellant.

ADAMS, J.—This action was brought by appellee against appellant in the Superior Court of Vanderburgh County. After the issues were formed a change of venue was taken to the Gibson Circuit Court, where the cause was tried by a jury, and a verdict returned for appellee. A motion for a new trial was overruled, and judgment was rendered on the verdict for \$900.

The errors assigned on appeal are as follows: The Superior Court of Vanderburgh County erred in overruling (1) the motion to make the complaint more specific, and (2) the demurrer to the complaint; and the court erred in overruling appellant's motion for a new trial.

The first error assigned is waived by failure to argue, and the second error calls in question the sufficiency of the complaint to state a cause of action. The complaint is in

1. one paragraph, and is uncertain and indefinite. It starts upon one theory and concludes upon another. It declares that appellee was employed in one line of service, and was injured while acting in obedience to the orders of the appellant in another line of service. There was also, as will hereinafter be seen, a variance between the proof and the averments of the complaint, and certain other errors which require a reversal of the cause. Upon a retrial it will be necessary to amend the complaint, and we do not think any good purpose would be served by passing upon the sufficiency thereof, in its present form.

In support of the third assignment of error, complaint is made of instruction three, given to the jury by the court on its own motion. This instruction is as follows: “If

2. you find for the plaintiff, in assessing the damages the plaintiff is entitled to recover in the case, the jury has the right to take into consideration all the facts and circumstances proved by the evidence, the nature and extent of plaintiff’s physical injury, whether or not such injury is permanent, and the fact, if it is a fact, that he has lost the full use of his right hand; his suffering in body, if any, resulting from such injuries, as the jury may believe from the evidence he has sustained by reason of such injuries; the loss of time and ability to work on account of such injuries. The jury has the right also to take into account the decrease of earning power, if any, caused by the injury, and altogether to find for the plaintiff such sum as in the judgment of the jury, under the evidence, will fairly compensate the plaintiff for the injuries he has sustained or will sustain.”

It is contended that by the words, “the jury has the right to take into consideration all the facts and circumstances proved by the evidence,” the court gave the jury complete liberty, in fixing the damages, to consider all the facts and circumstances in evidence in the case, without regard to their relevancy to, or bearing upon, the issue of damages. Appellant further insists that in almost every case, facts which may be proper for consideration upon some of the controverted questions are not proper upon the question of the measure of damages; that the jury is not to determine the amount of the recovery from all the facts, but only from such facts as form proper elements for consideration in estimating damages. In this contention, we think appellant is clearly right.

This court, in the case of *Broadstreet v. Hall* (1904), 32 Ind. App. 122, passed upon an instruction detailing the elements to be considered in determining the amount of damages, concluding with the following words: “And all facts

and circumstances proved in the case.” The court said: “It is not the province of the jury to determine the amount of recovery ‘from all the facts,’ but only from such facts as form proper elements for consideration in computing damages. The reason of this is self evident. If evidence goes to the jury which has no bearing whatever upon the question of damages, and the jury is told that in the determination of that question, it is to consider such evidence, or in the language of the instruction, ‘all other evidence and circumstances proved in the case,’ it has presented to it an incorrect basis from which to fix the amount of recovery. If there is any evidence which might lead to an incorrect assessment of damages, it is error to instruct the jury that it is its duty to consider ‘all the facts’ in reaching a conclusion as to the amount of damages.”

In the case of *Monongahela River, etc., Co. v. Hardsaw* (1907), 169 Ind. 147, a similar instruction was considered, which concluded with the words, “together with all the facts and circumstances in evidence in the case, and assess his damages in such sum as, from the evidence, you may deem proper, not exceeding the amount sued for.” The instruction was held erroneous upon the authority of *City of Delphi v. Lowery* (1881), 74 Ind. 520, 39 Am. Rep. 98, and the authorities cited.

In the case of *Knoefel v. Atkins* (1907), 40 Ind. App. 428, the court instructed the jury that “in fixing the amount of damages, you will consider all the circumstances of the case, as shown by the evidence,” and followed this statement, as in the instruction before us, with a specific enumeration of the elements entering into the question of damages. It was held that this instruction gave the jury “too wide a scope to draw upon in the assessment of damages, in that it might consider all the circumstances shown by the evidence, and in leaving the assessment to its judgment, not controlled by the proof in the case.”

In the case of *Pittsburgh, etc., R. Co. v. Reed* (1909), 44

Ind. App. 635, a similar instruction was given, and the words "all other facts and circumstances" were held to be harmless, for the reason that appellant failed to point out in its brief any fact or circumstance shown by the evidence that might be considered as improperly influencing the jury. It is a general rule of law that where the trial court, in charging the jury, has given an erroneous instruction, it must appear from the record on appeal that the error did not prejudice the complaining party, to prevent a reversal; but the appellant is not relieved from the primary duty of pointing out error.

In this case, appellant in his brief has directed our attention to certain evidence in the record not relevant to the question of damages, which might reasonably have prejudiced the jury against him, and we cannot say that the instruction was harmless.

The sufficiency of the evidence is also questioned under the third assignment of error. It is contended that the evidence

not only fails to prove that appellee was injured in

3. the manner set out in his complaint, but shows, without contradiction, that he could not have been so injured. It is charged "that the valve which is designed to hold the air, by the force and pressure of which air the hammer is held and kept from falling, until made to fall by the person operating a lever for that purpose, was old and defective and allowed the air to escape into the cylinder, which pressure allowed the hammer to fall instead of holding it." It appears from all the evidence relating to this matter that the hammer was made to fall by opening the valve, and fell of its own weight, but was raised and held up by compressed air. It necessarily follows that a defective valve which permitted air to leak into the cylinder would hold the hammer up rather than cause it to drop.

Again, the complaint charges that appellee was employed to feed tin and galvanized iron into the hammer. Upon cross-examination appellee testified that he had nothing to

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do with feeding tin into the hammer; that was the business of the man who operated the hammer.

Other errors are complained of under the third assignment, but as they may not arise upon a retrial they are not considered in this opinion.

The judgment is reversed, with instructions to sustain appellant's motion for a new trial, and for further proceedings not inconsistent with this opinion.

**BALTIMORE AND OHIO SOUTHWESTERN RAILWAY
COMPANY v. NEW ALBANY BOX AND
BASKET COMPANY.**

[No. 7,219. Filed April 25, 1911. Rehearing denied October 13, 1911. Transfer denied November 17, 1911.]

1. **COMMERCE.—Interstate.—Contracts.—Shipping Goods.—Liability of Shipper.**—One who engages a railroad company to transport freight in interstate commerce is liable for the established rate on such freight, regardless of any contract such shipper might have with the consignee. p. 651.
2. **COMMERCE.—Interstate.—Rates.—Publication.—Conditions Precedent.**—The tariff of rates for interstate commerce is established when such rates are filed with and promulgated by the interstate commerce commission; and the posting of such schedules is not a condition precedent to the carrier's right to collect such rates. p. 652.
3. **COMMERCE.—Interstate.—Rates.—Mistake.—Action for Balance.**—Where, by mistake, a railroad company's agent quoted a wrong rate on an interstate shipment, and such incorrect rate was paid, the company's action on account for the balance due is of legal, and not of equitable, cognizance. p. 653.
4. **COMMERCE.—Interstate.—Rates.—Notice.**—A shipper must take notice of the rates for interstate shipments; and he relies, at his peril, on the statement of the carrier's agent. p. 654.
5. **CONTRACTS.—Illegal.—Estoppel.—Interstate Commerce.—Rates.**—An interstate carrier is not estopped from recovering the balance due for a shipment by the unauthorized act of its agent in quoting an illegal freight rate. p. 654.
6. **CONTRACTS.—Interstate Freight Rates.**—Parties have no power to fix the rates on interstate shipments; and contracts therefor are void. pp. 655, 657.
7. **COURTS.—Jurisdiction.—Interstate Commerce.—Rates.**—The state courts have jurisdiction of actions by carriers for the recovery

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ery of the balance due from shippers engaged in interstate commerce. p. 657.

8. APPEAL.—*Rehearing.*—*Jurisdiction.*—The question of want of jurisdiction can be raised at any time, even on petition for a rehearing. p. 657.

From Floyd Circuit Court; *William C. Utz*, Judge.

Action by the Baltimore and Ohio Railway Company against the New Albany Box and Basket Company. From a judgment for defendant, plaintiff appeals. *Reversed.*

Charles L. Jewett, Henry E. Jewett, Edward Barton and R. S. Allen, for appellant.

A. Dowling, for appellee.

ADAMS, J.—This action was brought by appellant against appellee to recover an unpaid balance of certain freight charges, alleged to be due to appellant for transporting a carload of nested baskets for appellee from New Albany, Indiana, to Hudson, New York.

The amended complaint is in one paragraph, and states that prior to April 7, 1905, plaintiff was, and since said date has been, a railroad corporation, owning and operating a line of steam railroad extending through the states of Illinois, Indiana and Ohio, and, in conjunction with connecting carriers, is engaged in interstate commerce between New Albany, Indiana, and Hudson, New York; that prior to April 7, 1905, plaintiff and its connecting carriers, in compliance with the statutes of the United States, commonly known as the "Interstate Commerce Law," had established and published official tariffs of the rates to be charged for transporting goods and merchandise from New Albany, Indiana, to Hudson, New York; that said tariffs had been duly published and filed with the Interstate Commerce Commission, and were kept on file in the office of plaintiff at New Albany, Indiana, accessible to, and for the information of, shippers and of defendant; that on April 7, and during the performance of the services hereinafter named, said rates were in full force, and bound plaintiff and connecting carriers to the rate there-

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in fixed for the transportation of merchandise between the points named; that the rate so fixed and in force at the time, to be charged for the transportation of one carload of nested baskets from New Albany, Indiana, to Hudson, New York, was \$114; that defendant was engaged in manufacturing nested baskets at New Albany, Indiana, and shipping them by rail to points in other states in carload lots; that it had a selling price for its baskets, and, by its method of doing business, fixed the price at which it would sell and deliver a carload of its product to a given purchaser by adding to the selling price the freight to be charged for transportation from New Albany to destination, and quoting the aggregate as its price free on board at destination; that when the cars arrived at destination the consignee paid the freight charges, and remitted the balance of said price to defendant in full settlement; that on said April 7, 1905, defendant had an order for a carload of nested baskets to be delivered to A. W. Ham, Hudson, New York, and applied to plaintiff's agent at New Albany, Indiana, for information as to the charge for transporting a car from New Albany to Hudson; that by mistake and inadvertence of said agent defendant was informed that the rate was \$68.40, instead of \$114, the fixed and lawful rate; that defendant did not examine the tariffs for itself, but acted upon the statement of said agent, and quoted and shipped a carload of baskets at a price based on the erroneous statement of the rate; that the car was received by plaintiff, and transported over its line and the lines of connecting carriers to Hudson, New York, and there delivered to said A. W. Ham, upon the payment by him of \$68.40, as the full freight charges; that plaintiff's other agents, and those of its connecting carriers, participated in and perpetuated the mistake of the agent at New Albany as to the rate, and not until after the goods had been delivered was it discovered that an illegal rate had been charged; that on September 9, 1907, plaintiff and its connecting carriers notified said A. W. Ham that said car had been transported at less

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than the lawful rate, and demanded that he pay the sum of \$45.60, which he refused to do; that on December 6, 1907, plaintiff likewise notified defendant and demanded that it pay said balance of \$45.60, which defendant refused and still refuses to pay; that said sum of \$45.60, with interest from April 7, 1905, is due and wholly unpaid. Judgment is demanded in the sum of \$55.

To this amended complaint defendant filed its demurrer, on the ground that it did not state facts sufficient to constitute a cause of action. The court sustained defendant's demurrer, and, plaintiff electing to abide by its amended complaint and its exception to the ruling of the court in sustaining the demurrer thereto, final judgment was rendered against it, that it take nothing by its complaint, and that defendant recover its costs.

The amended assignment of errors sets out six separate specifications, the first of which is that the court erred in sustaining defendant's demurrer to plaintiff's amended complaint. The remaining specifications of error are included in the first.

Amended section six of the interstate commerce act reads as follows: "That every common carrier subject to the provisions of this act shall file with the commission created by this act and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe-line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print and keep open to public inspection, as aforesaid, the separately established rates, fares and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classifi-

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cation of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected. * * * No carrier, unless otherwise provided by this act, shall engage or participate in the transportation of passengers or property, as defined in this act, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this act; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs.” 34 Stat. 586, U. S. Comp. Stat. Supp. 1909, 1153.

It is urged that no cause of action is stated against appellee, for the reason that the complaint avers that the freight charges were paid by the consignee; that it was the

1. duty of the last carrier to collect transportation charges, and to this end such carrier is given a lien upon the property transported, for such charges. While this

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is true, it was the shipper—in this case the appellee—who engaged the services of appellant, and who became liable for the charges in the first instance. Such liability could only be discharged by payment. Assuming that the complaint otherwise states a cause of action, the action was properly brought against appellee.

It is next insisted that the complaint does not show compliance with the terms of the interstate commerce act, in that there is no averment that on April 5, 1905, appellant had “posted” two copies of the tariff schedules in its office or station at New Albany, Indiana. The complaint avers that “before April 7, 1905, the plaintiff and its connecting carriers, through which goods and merchandise was transported from New Albany, Indiana, to Hudson, New York, had, in compliance with law, established and published official tariffs of its rates and charges for the transportation of goods, wares and merchandise between New Albany, Indiana, and Hudson, New York, which tariffs had before that time been duly published, and had been filed with the Interstate Commerce Commission of the United States, and were also kept on file at the office of plaintiff in New Albany, where they were accessible for public inspection and for information, and for the inspection and information of defendant.”

The tariff of rates is established and in force when it has been published and filed with the Interstate Commerce Commission, and has been approved and promulgated by

2. said commission. The posting of the schedules in the office or station of the carrier is not a condition precedent to the taking effect of such rates. This was settled by the United States Supreme Court, in the case of *Texas, etc., R. Co. v. Cisco Oil Mill* (1907), 204 U. S. 449, 27 Sup. Ct. 358, 51 L. Ed. 562, in which Mr. Justice White, delivering the opinion of the court, said: “The requirement that schedules should be ‘posted in two public and conspicuous places in each depot,’ etc., was not made a condition prece-

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dent to the establishment and putting in force of the tariff of rates, but was a provision based upon the existence of an established rate, and plainly had for its object the affording of special facilities to the public for ascertaining the rates actually in force." See, also, *United States v. Howell* (1892), 56 Fed. 21, 29.

To hold that before the tariff of rates and charges, approved by the Interstate Commerce Commission, becomes effective, it is necessary that the schedules should be posted in two public and conspicuous places in appellant's station at New Albany, Indiana, would be to hold that the putting in force of the rates for transportation of interstate commerce depends upon the act of the railroad company or its agents. This would be an impossible interpretation to place on the act in question. It would give the railroad company, which might be injuriously affected by the established rates, the power practically to nullify the orders of the commission, by neglecting or refusing to post the schedules. Whether failure to post, as insisted by appellee, would subject appellant to penalties, as provided in section ten of the act, is not under consideration, and could not, in any event, be determined in this jurisdiction.

Appellee is in error in assuming that this is an equitable proceeding for the correction of a mistake, and therefore is governed by the rules that obtain in equity causes.

3. The complaint before us will not bear such construction. It is clearly an action to collect a balance due on freight charges. The manifest purpose of appellant in setting out the details of the transaction with such fullness, was that the questions of law arising upon the facts might be determined by the ruling upon demurrer to the complaint. The action being one at law, no question of laches arises, and the suit could be brought at any time within the period of limitation.

It is finally insisted by the learned counsel for appellee

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that as the freight rate between New Albany, Indiana, and Hudson, New York, over appellant's railroad and its

4. connecting lines, was peculiarly within the knowledge of appellant and its agents, and as appellee relied on the statement of the agent, and sold his goods accordingly, any loss resulting from the mistake of appellant's agent should be borne by the party whose declarations caused the loss. This would ordinarily be true; but, as applied to the facts stated in this complaint, the contention is without merit. The averments of the complaint are that appellee applied to appellant's agent for information as to the freight rate on a car of nested baskets from New Albany, Indiana, to Hudson, New York, to enable appellee to quote a price on the baskets delivered at the point of destination; that, by mistake and inadvertence, appellant's agent informed appellee that the freight charge was \$68.40, when in truth the established legal rate was \$114; that the official tariffs, showing the freight rates between the points named, were on file at appellant's office, where such tariffs were accessible for public inspection, and for the information of appellee. These averments do not make out an agreement of any kind. Appellee, as well as appellant, as a matter of law, was charged with notice and knowledge of the legal rate; but assuming that there was an agreement to deliver the car at destination for \$68.40, appellant would not be estopped from demanding and collecting the full legal rate.

A carrier will not be estopped by the act of its agent from repudiating an unlawful contract for the transportation of interstate commerce; and where a shipper

5. relies upon an agreement of the carrier, made either purposely or inadvertently, no estoppel will arise, for the reason that the agreement upon which the shipper relies is in itself illegal and void, and estoppel can never be founded upon an illegal act or contract. *Melody v. Great Northern R. Co.* (1910), 25 S. Dak. 606, 127 N. W. 543; *Louisiana R., etc., Co. v. Holly* (1911), 53 South. (La.) 882.

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It has been held repeatedly that the right of private contract between the shipper and the carrier has been wholly abrogated by the enactment of the interstate commerce law. After the tariff of rates has been duly established, as provided by law, the rate on any given shipment ceases to be a matter for negotiation between the parties. The carrier is then required by law to render a service for the public, and the established freight charges are enforceable, not by reason of any contract, but by virtue of the law that fixes the rates. *Baltimore, etc., R. Co. v. La Due* (1908), 112 N. Y. Supp. 964, 128 App. Div. 594; *New York, etc., R. Co. v. Smith* (1909), 115 N. Y. Supp. 838, 62 Misc. 526; *Texas, etc., R. Co. v. Mugg* (1906), 202 U. S. 242, 26 Sup. Ct. 628, 50 L. Ed. 1011; *Gulf, etc., R. v. Hefley* (1895), 158 U. S. 98, 15 Sup. Ct. 802, 39 L. Ed. 910; *Texas, etc., R. Co. v. Abilene Cotton Oil Co.* (1907), 204 U. S. 426, 27 Sup. Ct. 350, 51 L. Ed. 553; *Fisher v. Great Northern R. Co.* (1908), 49 Wash. 205, 95 Pac. 77; *Armour Packing Co. v. United States* (1908), 209 U. S. 56, 28 Sup. Ct. 428, 52 L. Ed. 681.

In the case of *Baltimore, etc., R. Co. v. La Due*, *supra*, the court said: "Every contract of carriage by a common carrier engaged in interstate commerce must, as a matter of law, be at the rate fixed and established as provided by statute, and no agreement as to the rate to be charged is valid or enforceable if it varies in any degree from the rate thus fixed and established. * * * The carrier is entitled to receive, and the shipper is required to pay, the rates fixed. No more can lawfully be demanded. No less can lawfully be accepted. In an action, therefore, to recover excess charges, it is wholly immaterial whether or not any special agreement was made as to rates. If the rate charged corresponded with the established schedule, it was lawfully charged. If it did not so correspond, it was unlawfully charged, and the excess may be recovered." To the same effect are the cases of *Central Ga. R. Co. v. Butler Marble, etc., Co.* (1910), 8

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Ga. App. 1, 68 S. E. 777, and *Georgia Railroad v. Creety* (1908), 5 Ga. App. 424, 63 S. E. 528.

In the case last cited, the court said: “What we are compelled to hold is that where the transportation has taken place, the shipper is due the carrier the amount of charges required by the schedule of rates filed and published in accordance with the law, and that no agreement to the contrary can exempt him from liability for the sum thus due, and that if the carrier delivers the goods without collecting the full sum required by the tariffs, an action will lie in his favor to recover the unpaid balance.”

Nor is the question of the good faith of both the appellee and the agent of appellant, nor the fact that appellee will suffer loss in consequence of the mistake made, proper matters for consideration in determining the law of this case. Good faith would doubtless save the parties from the charge of criminal intent, at least up to the time when the truth became known, and the loss suffered by appellee cannot affect or change the rule of law. The rate given to appellee was an unlawful rate, and can neither bind the company making it nor protect the shipper receiving its benefits. *Chicago, etc., R. Co. v. Hubbell* (1894), 54 Kan. 232, 38 Pac. 266; *St. Louis, etc., R. Co. v. Ostrander* (1899), 66 Ark. 567, 52 S. W. 435; *Haurigan v. Chicago, etc., R. Co.* (1907), 80 Neb. 132, 139, 117 N. W. 100.

Our conclusion is that the complaint in this case states a cause of action, and the demurrer thereto should have been overruled. The judgment is therefore reversed, with instructions to overrule the demurrer to the complaint, and for further proceedings not inconsistent with this opinion.

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ON PETITION FOR REHEARING.

ADAMS, J.—In a petition for rehearing, it is urged with much earnestness by counsel for appellee that the Floyd Circuit Court had no jurisdiction of the subject-

7. matter of the action, and that therefore this court could not acquire jurisdiction on appeal. If the first proposition is true, then the conclusion is obviously true.

The question is presented for the first time on petition for rehearing. The rules provide that points not made in the original briefs will not be considered on rehearing,

8. but we think the question of jurisdiction is one of such a character that it should be considered by the court at any time while the appeal is pending.

In the original opinion it was held that the complaint stated a cause of action for the collection of a balance due on interstate freight charges. This holding is not questioned, but it is now insisted that the action was founded upon an alleged violation of the United States statute known as the "interstate commerce law," and that jurisdiction was in the federal court rather than in the state court. We cannot agree with counsel for appellee in this contention.

It was clearly stated in the original opinion that the freight rate on said shipment was not and could not be a matter of negotiation between the shipper and the carrier.

6. The only agreement that could be entered into by these parties was that which impliedly arose through the tender of the freight by appellee and the acceptance of it by appellant for transportation and delivery at destination. The consideration for this service was fixed by law, and became a part of the agreement. When the appellant undertook to deliver appellee's goods at Hudson, New York, the lawful charge for such service was \$114, which presumptively was known by both parties. For this charge the carrier was

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bound to render the service, and for this service the shipper was bound to pay the lawful rate.

The complaint charges that the rate fixed by law, and which appellee was bound to pay, has not been paid in full, and to collect the unpaid balance, this action was brought. The proceeding was not founded upon an alleged violation of a federal statute, but was to collect a debt that arose out of transportation service rendered by appellant, pursuant to an implied agreement.

The Floyd Circuit Court had jurisdiction not only of the parties, but also of the subject-matter. The petition for rehearing is overruled.

HEDRICK, EXECUTOR, v. HEDRICK.

[No. 7,706. Filed April 6, 1911. Rehearing denied June 27, 1911.
Transfer denied November 21, 1911.]

1. *APPEAL.—Weighing Evidence.*—The jury trying a case is the sole judge of the weight of the evidence and of the credibility of the witnesses; and where there is some evidence tending to sustain every material allegation of the complaint, the judgment will not be disturbed, on appeal, for a want of evidence. p. 660.
2. *WORK AND LABOR.—Compensation.—Payment.—Evidence.*—Where plaintiff alleges that, by contract, she was to receive \$1.50 a week for her services, and that if she remained with decedent and his wife during their lives, she was to receive certain land, and the evidence shows that she so remained, and that she received \$1.50 a week, it is for the jury to determine whether she was paid in full. p. 661.
3. *WORK AND LABOR.—Burden of Proof.—Harmless Error.*—In an action for services rendered, an instruction that if the claimant rendered any services "for which she has not already been paid, she would be entitled to recover the reasonable value thereof, unless they were gratuitously rendered, and the burden is on defendant to show that they were rendered gratuitously, if rendered at all," is erroneous, the burden being upon plaintiff to establish affirmatively her right to recover; but such error was harmless, where there was no evidence that such services were rendered gratuitously. p. 661.

From Rush Circuit Court; *Will M. Sparks*, Judge.

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Action by Anna Hedrick against John D. Hedrick, as executor of the last will of Peter Hedrick, deceased. From a judgment for plaintiff, defendant appeals. *Affirmed.*

John Lockridge, Smith, Cambern & Smith, W. W. Cook and Charles H. Cook, for appellant.

Douglas Morris and Forkner & Forkner, for appellee.

LAIRY, J.—Appellee filed a verified claim in two paragraphs against the estate of Peter Hedrick. The first paragraph was a general claim for services rendered in doing house and farm work, and in nursing and caring for decedent and his wife, and for general services from March, 1902, to March, 1909. The second paragraph alleged a special contract made between decedent, in his lifetime, and appellee and her parents, by the terms of which decedent agreed that if appellee would come and work for him in his family, and take care of himself and his wife, he would pay her at the rate of \$1.50 a week for her services, and, in case she stayed with him and his wife, and cared for them as long as they lived, he would give her, at his death, a certain forty acres of land; that appellee fully performed her part of the agreement, and that decedent died without having made a will, or without leaving to appellee said forty acres of land in accordance with his agreement; that the services rendered by appellee were reasonably worth \$4,000; that the said sum of \$1.50 a week had been paid. Defendant demurred separately to each paragraph of the complaint, which demurrers were overruled, and these rulings are assigned as error. But as appellant has failed in his brief to discuss the sufficiency of either paragraph, or to cite any authority bearing thereon, these errors will be considered as waived.

It is contended by appellant that the lower court should have granted a new trial, on the ground that the verdict is not supported by the evidence, which is quite voluminous. Appellee introduced testimony tending to prove that there was a contract entered into between her and her parents on

the one side, and Peter Hedrick on the other, before she went to live in the family of the decedent, by the terms of which contract she was to receive \$1.50 a week for her labor, and in the event she stayed with the family until the death of Peter Hedrick and his wife, she was to receive forty acres of land. The evidence introduced by appellee tended to show further that in the spring of 1902 she went to decedent's home, and lived with him and his wife and worked for them until they died, with the exception of a short time during which she was married and lived with her husband; that after her separation from her husband she returned to decedent's home, and he renewed his promise to give her the forty acres of land; that decedent was old and sick during the time appellee lived there, and his wife was also old and feeble; that the work performed by appellee was very disagreeable, and the services were reasonably worth \$1 a day; that she was paid at the rate of \$1.50 a week, during the time she lived in decedent's family, but that decedent failed to keep his contract in respect to giving her forty acres of land, or its value in money.

There was sharp conflict in the evidence. The testimony introduced by defendant tended to show that there was no contract by which decedent, Peter Hedrick, agreed to

1. pay appellee anything in excess of the \$1.50 a week, and that she admitted after the death of Peter Hedrick that she had been fully paid for her services. It also tended to prove that Peter Hedrick and his wife were healthy old people, that appellee did very little work, spent most of her time looking after her own children, and that the services rendered by her were not worth \$1.50 a week.

The jury trying the case was the sole judge of the weight of the evidence and the credibility of the witnesses. The questions of fact involved in this case were submitted to the jury, and it returned a verdict in favor of the claimant. There was evidence upon every question material to a recov-

ery, and this court cannot interfere with the verdict upon the weight of the evidence.

It is urged by appellant that the evidence introduced by the executor clearly shows that appellee had been paid in full, and that this evidence was undisputed. In this

2. contention appellant is mistaken. The evidence shows without dispute that appellee was paid \$1.50 a week during the time she worked in decedent's household. Whether this was payment in full depended upon the amount that was due to her for her labor. If the jury believed from the evidence that appellee went to work for decedent, with the express understanding that she was to have \$1.50 a week for her services, and that if she stayed and took care of decedent and his wife as long as they lived she should receive forty acres of land in addition to that sum—this would indicate that the services were rendered with the understanding that the weekly payments were not intended as full compensation for her services; and if the jury found that her services were worth an amount in excess of \$1.50 a week, then it would be justified in finding that claimant had not been paid in full for her services.

Objection is made to several instructions given by the court of its own motion. We have examined these instructions, and think that all except the fifth are correct.

3. The fifth instruction is as follows: "In this case, if you find that the claimant rendered any services to decedent for which she has not already been paid, she would be entitled to recover the reasonable value thereof, unless they were gratuitously rendered, and the burden is on the defendant to show that they were rendered gratuitously, if rendered at all." According to a recent case decided by this court (*Hunt v. Osborn* [1907], 40 Ind. App. 646) this instruction is erroneous. The instruction in that case was almost identical with the one complained of in the case at bar. It read as follows: "If you believe from

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a fair preponderance of the evidence that the plaintiff performed the services, or any part thereof, mentioned in his claim, under the direction of decedent, then you should allow him reasonable pay for such services so performed, unless it is shown by a fair preponderance of the evidence that such services were performed under such circumstances that the claimant is not entitled to pay therefor, and the burden of proving such defense by a fair preponderance of the evidence is upon the defendant.” In passing upon the correctness of this instruction the court said: “But the burden of establishing his claim was upon the appellee. He must show by a preponderance of the evidence not only that the services charged for were rendered, but that they were rendered at the request of the decedent, and that he promised to pay for them. This burden could be met by proof of services rendered, their beneficial character, and their acceptance by the decedent. From these circumstances the law would presume the request and promise to pay, but the presumption is not a conclusive one, and may be rebutted by proof of facts and circumstances showing that the services were gratuitously rendered, and this would not be proof of an affirmative defense, but a denial of the promise to pay. The instruction quoted, which placed the burden of making out a negative defense to appellee’s claim upon the appellant, was clearly erroneous.”

This instruction being erroneous, the judgment in this case must be reversed, unless it clearly appears from the whole record that the error was harmless. There was no evidence introduced tending to show that any of the services rendered by appellee were gratuitous. The evidence, without dispute, shows that appellee was to receive \$1.50 a week, and that this amount had been paid. Appellee’s claim for compensation in excess of that amount is based upon the ground that the amount stipulated to be paid weekly was not intended as full payment, and that she rendered the services under an express agreement with decedent that she should be given

forty acres of land in the event she stayed and took care of him and his wife as long as they lived. The first disputed question of fact that the jury had to determine was whether this agreement was made. If it found that this agreement was made, the only other disputed question was, what amount such services were worth in excess of \$1.50 a week. The question as to whether any services were gratuitously rendered was not before the jury, and no instruction should have been given bearing upon this subject. An erroneous instruction as to the burden of proof on this question did not harm the appellant, for the reason that if the jury had found that the services of appellee were rendered gratuitously, there would have been no evidence to sustain such a finding. *City of Indianapolis v. Cauley* (1905), 164 Ind. 304, 312; *Indianapolis, etc., Transit Co. v. Haines* (1904), 33 Ind. App. 63; *McCall v. Seevers* (1854), 5 Ind. 187.

If the verdict had been against appellee, she might have complained of this instruction, for the reason that it submitted to the jury the question as to whether her services, or a part thereof, were gratuitously rendered, where there was no evidence which would justify a finding against her on that question. *McMahon v. Flanders* (1878), 64 Ind. 334; *Moore v. State* (1879), 65 Ind. 382.

In the case of *Hunt v. Osborn*, *supra*, the court said: "The question on which the decision of the case hinged was whether, at the time the services were rendered, the appellee expected to charge for them. It was claimed by the estate that they were mere acts of neighborly kindness rendered without charge or expectation of pay therefor at the time, and that the charge now made was an afterthought." The question as to whether the services were gratuitously rendered was the pivotal question in that case; but in this case, no such question was presented by the evidence. As there is no evidence tending to prove that any of the services rendered by appellee to decedent were gratuitous, and as a finding in favor of appellant on this ground would have

no evidence to support it, we hold that an erroneous instruction as to the burden of proof on that question did not harm appellant.

Judgment affirmed.

BOUSHER ET AL. v. ANDREWS ET AL.

[No. 7,163. Filed November 22, 1911.]

1. **QUIETING TITLE.—*Complaint.***—A complaint, alleging that the plaintiffs own certain real estate, and that defendants claim an interest therein, which claim is unfounded and constitutes a cloud upon plaintiff's title, will be held sufficient. p. 665.
2. **QUIETING TITLE.—*Ownership.—How Alleged.—Complaint.***—A complaint alleging that the plaintiffs were tenants by the entirety of certain land and that they are entitled to the free and uninterrupted possession thereof, shows ownership sufficiently to withstand a demurrer. p. 666.
3. **QUIETING TITLE.—*Issues.—Evidence.***—In a suit to quiet title, the defendants may introduce evidence of any right which they may claim, the claim of any right by defendants being necessarily adverse to the ownership in fee by the plaintiff. p. 666.
4. **QUIETING TITLE.—*Possession.—Evidence.***—In a suit to quiet title, the plaintiffs alleging their ownership and right to possession, and the defendants pleading a general denial, evidence of an easement claimed by defendants is admissible. p. 666.
5. **PLEADING.—*Judgment.—Motion in Arrest.—Complaint.—Paragraphs.***—A motion in arrest of judgment should be overruled where any one of the paragraphs of complaint is good. pp. 667, 668.
6. **QUIETING TITLE.—*Description.—Complaint.***—In a suit to quiet title, a description of the land in question as "twenty acres off of the west side of the northwest quarter of the northwest quarter" of a certain section, is sufficient. p. 667.
7. **PLEADING. — *Complaint. — Paragraphs. — Motion in Arrest. —*** Where the paragraph of complaint on which the judgment rests is sufficient on demurrer, a motion in arrest should be overruled, regardless of the sufficiency of the other paragraphs. p. 668.

From White Circuit Court; *James P. Wason*, Judge.

Suit by Frank Andrews and another against Mary Bousher and others. From a decree for plaintiffs, defendants appeal. *Affirmed.*

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Alfred W. Reynolds, Addison K. Sills and Addison K. Sills, Jr., for appellants.

Truman F. Palmer, Benjamin F. Carr and George F. Marvin, for appellees.

MYERS, J.—Appellees brought this suit against appellants to quiet their title to certain real estate in White county, and to enjoin appellants from interfering with a certain gate.

The issues submitted to the court for trial were formed by a complaint in three paragraphs, with an answer of confession and avoidance, a denial to the first paragraph, and a reply thereto in denial, and a general denial to the other paragraphs. There was a finding and judgment in favor of appellees on the second paragraph of the complaint.

Appellants' separate and several demurrers for want of facts to said second paragraph were overruled, as was also the motion by each appellant in arrest of judgment. These rulings of the court are made the basis for a separate assignment of error by appellants severally. Both assignments of error are predicated on the insufficiency of the second paragraph, in that it does not state a cause of action; and that, for lack of a definite description of the real estate, there could be no valid judgment.

As to the first assignment, it appears from the paragraph in question that appellees are husband and wife, and own as tenants by the entirety, and are entitled to the

1. free and uninterrupted possession of, a certain twenty-acre tract of land in White county, Indiana, to which each appellant claims some right, title, interest and easement, and the free right to pass over a strip thereof along its entire west line; that said claim of each appellant is unfounded and without right, and that appellees' title to said real estate is superior and paramount to any pretended claim of appellants, or either of them.

This paragraph proceeds upon the theory of a suit to quiet title, a proceeding which is now regarded as essentially

statutory (*Seymour Water Co. v. City of Seymour* [1904], 163 Ind. 120; *Puterbaugh v. Puterbaugh* [1892], 131 Ind. 288, 15 L. R. A. 341); and were it not for the pleaders' lack of care in its preparation, there would be no basis for the reasonable and persuasive argument here urged against it.

Section 1116 Burns 1908, §1070 R. S. 1881, authorizes one having an interest in real property to maintain a suit to quiet his title thereto against another who claims an interest adverse to him. Under this section of the statute, a complaint showing that the plaintiff is the owner of the real estate described therein, and that the defendant in the action claims an interest in the same land, and that such claim is adverse to the title so asserted by plaintiff, will be held sufficient. *Rennert v. Shirk* (1904), 163 Ind. 542.

While this paragraph does not state the precise character of the title claimed by appellees, yet it does show that they own the land as tenants by the entirety, and are entitled to the free and uninterrupted possession thereof. This was a sufficient allegation of ownership to withstand a demurrer. *Hall v. Hedrick* (1890), 125 Ind. 326; *Mitchell v. Bain* (1895), 142 Ind. 604.

As to the appellants, it is alleged that they are claiming an easement and right at will to cross said land, which claim is alleged to be unfounded and without right.

3. If we may assume that this controversy was over a right of way across appellees' land, that right is denied, and under the issues the same evidence was admissible as if appellees were claiming title to the land in fee simple. *Hall v. Hedrick, supra*. The law regards any claim of title to real estate by one as necessarily adverse to another who owns the fee. *Dumont v. Dufore* (1866), 27 Ind. 263. The alleged easement claimed by appellants affected appellee's right to possession, an element ordinarily enjoyed without hindrance by the owner, and here the right to possession is put in issue by the allegation that appellees are entitled to the free and uninterrupted

possession of the land in question. Therefore, if appellees owned the land, and were entitled to the free and uninterrupted possession thereof, the claimed rights of appellants were certainly adverse to the alleged rights of appellees, and, this being true, it follows that the facts alleged in this paragraph show existing adverse interests, which, under the statute to which we have referred, entitled the parties to an adjudication of their claims in a suit to quiet title. *Rausch v. Trustees, etc.* (1866), 107 Ind. 1; *Weaver v. Apple* (1897), 147 Ind. 304; *Corbin Oil Co. v. Searles* (1905), 36 Ind. App. 215; *City of LaFayette v. Wabash R. Co.* (1902), 28 Ind. App. 497.

Considering the motion in arrest of judgment, the rule is that where such motion is addressed to a complaint containing more than one paragraph, unless all are so

5. bad as not to be cured by the verdict or finding, the motion will be overruled. *Sims v. Dame* (1888), 113 Ind. 127; *Durham v. Hiatt* (1891), 127 Ind. 514; *Peden v. Mail* (1889), 118 Ind. 556; *Gilmore v. Ward* (1899), 22 Ind. App. 106. But in the case before us, the motion is made to apply to the paragraph on which it affirmatively appears from the record that the judgment rests.

In support of this motion it is insisted that that paragraph was insufficient, for the reason that it did not contain

a definite and certain description of the land, the

6. title to which was sought to be quieted. The description was as follows: "Twenty acres off of the west side of the northwest quarter of the northwest quarter of section nine, township twenty-seven north, range three west," in White county, Indiana. The description certainly pointed out the land, and that is all that was required. The paragraph was good as against a demurrer, and the defect pointed out did not affect the merits of the cause. The motion was properly overruled. *Howe Machine Co. v. Reber* (1879), 66 Ind. 498; *City of LaFayette v. West* (1900), 43 Ind. App. 325. "Such motions address themselves to the

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entire complaint, and if a single paragraph is sufficient the motion must fail. A single paragraph of such pleading can alone be successfully assailed by a demurrer." *Louisville, etc., R. Co. v. For* (1885), 101 Ind.

416. A motion in arrest of judgment on the whole complaint and on each paragraph was overruled, and this ruling was sustained, on the theory that one paragraph was good.

Spahr v. Nicklaus (1875), 51 Ind. 221. Where it

7. appears that the judgment is founded upon a paragraph sufficient as against a demurrer, a motion in arrest should be overruled, regardless of the other paragraphs. *Price v. Boyce* (1894), 10 Ind. App. 145.

Judgment affirmed.

BARRETT v. CLEVELAND, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY COMPANY.

[No. 7,325. Filed November 22, 1911.]

1. PLEADING.—*Insufficient Complaint.*—*Defective Answer.*—Where a complaint is bad, the overruling of a demurrer to a bad paragraph of answer, is not prejudicial. p. 671.
2. NEGLIGENCE.—*Wilful Injuries.*—*Complaint.*—A single paragraph of complaint cannot combine a negligent injury with a wilful one, such torts being inconsistent; and where both are alleged the court must determine from the language used which was really intended. p. 671.
3. RAILROADS.—*Rights of Way.*—*Destroying Drain.*—*Negligence.*—*Complaint.*—A complaint alleging that defendant railroad company "negligently, wilfully and purposely broke the tile" under its main track upon its right of way, will be construed as counting on a negligent and not a wilful injury. p. 673.
4. NEGLIGENCE.—*Elements.*—*Knowledge.*—*Complaint.*—A complaint for negligence must allege facts showing a duty owing to plaintiff from defendant, and that the defendant had knowledge thereof. p. 673.
5. RAILROADS.—*Drains.*—*Destruction of.*—*Complaint.*—A complaint alleging that defendant railroad company negligently destroyed plaintiff's drain on its right of way is not sufficient, where it

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falls to show that the drain was a natural watercourse, or a public drain, or that defendant had knowledge thereof, or that the plaintiff had any contractual or prescriptive right to the use thereof. p. 674.

6. RAILROADS.—*Surface-Waters*.—Railroad companies are not required to provide for the drainage of surface-waters from the lands of others. p. 674.

From Rush Circuit Court; *Will M. Sparks*, Judge.

Action by Cyrus C. Barrett against the Cleveland, Cincinnati, Chicago and St. Louis Railway Company. From a judgment for defendant, plaintiff appeals. *Affirmed*.

Newby & Newby and *Megee & Kiplinger*, for appellant.

Frank L. Littleton, *C. E. Cowgill* and *L. J. Hackney*, for appellee.

ADAMS, J.—Appellant, who was plaintiff below, brought this action against appellee, to recover damages for the breaking down of a tile-drain on the right of way and under the tracks of the appellee. After alleging that appellee is a corporation operating a line of railway from the city of Anderson, Indiana, south through Rush county, and over and through the lands of appellant in said county, it is averred “that before said railway was constructed there was a good and sufficient tile drain across the lands of plaintiff, running from a westerly to an easterly direction to the lands of Frederick Leisure, and thence to Blue river; that said drain was ample and sufficient properly to drain said lands of plaintiff, but that said defendant constructed its said railway across said lands from a northeasterly to a southwesterly direction over and across said tile drain; that on or about April 1, 1906, said railway company negligently, wilfully and purposely broke the tile in said drain at a point under its main track, on its right of way on said lands, thereby causing said drain to cave in and obstruct the free flow of water therethrough; that, as a further obstruction to the flow of water through said drain, said railway company, by its officers, agents and employes, filled

said drain with dirt and gravel, so as wholly to obstruct the flow of water through said drain, and thereby caused the water that should flow through said drain to back and overflow the lands of plaintiff, so as to render said lands unfit for farming or for any purpose whatever; that before said drain was so broken and filled by defendant, said lands were fertile, dry and very productive, and in fit and proper condition to raise all kinds of farm products, but by the action of defendant, aforesaid, said lands were rendered wet and unfit for farming or for any other purpose; that by reason of the action of defendant, its agents and employes, said plaintiff's lands and all growing crops thereon were overflowed each and every year since the obstruction was made, and a large tract of land, to wit, twenty-five acres, was rendered useless and of no value, to the injury and damage of the plaintiff in the sum of \$1,000."

Appellee demurred to this complaint for want of facts sufficient to constitute a cause of action, which demurrer was overruled by the court. The answer was in two paragraphs. The first was in denial, and the second set out facts relating to the time, terms and manner of acquiring the right of way across appellant's farm, and the right secured to appellee by the deed of conveyance. A demurrer was addressed to the second paragraph of answer, and was not only overruled, but was carried back by the court, and sustained to the complaint.

Appellant refused to plead further and elected to stand by his exception to the action of the court in overruling his demurrer to the second paragraph of answer, and carrying said demurrer back, and sustaining it to the complaint. Judgment was rendered against appellant for costs.

Several errors are assigned, but the error argued and relied on for reversal in this court relates to the overruling of appellant's demurrer to the second paragraph of answer, and the action of the court in carrying said demurrer back, and sustaining it to the complaint.

If there was no error in sustaining the demurrer to the complaint, then the action of the court in overruling the demurrer to the second paragraph of answer would

1. not be error, even if said paragraph were bad, under the well-recognized rule that a bad answer is good enough for a bad complaint. *Alexander v. Spaulding* (1903), 160 Ind. 176; *Grace v. Cox* (1896), 16 Ind. App. 150.

The sufficiency of the complaint, therefore, is the only question to be determined upon this appeal. Before considering the main question, however, the nature of the

2. action set forth in the complaint must be determined.

It will be noted that the act complained of is that the tile in the ditch was negligently, wilfully and purposely broken by appellee, at a point under its main track, and on its right of way. It is clear that an act could not be done both wilfully and negligently. Wilfulness and negligence are diametrically opposite to each other. One imports inattention, inadvertence and indifference, while the other imports intention, purpose and design. There can be no negligence with intent, and no wilfulness without intent. It does not strengthen a pleading to allege both negligence and wilfulness. The action must be predicated upon one theory or the other. *Miller v. Miller* (1897), 17 Ind. App. 605, 609; *Louisville, etc., R. Co. v. Bryan* (1886), 107 Ind. 51, 54.

“ ‘The pleader is not at liberty to leave his pleading open to different constructions, and then take his choice between them.’ [*Van Etten v. Hurst* (1884), 6 Hill 311, 41 Am. Dec. 748.] Facts must be stated directly and positively, and not indirectly nor in the alternative.” *Langsdale v. Woollen* (1889), 120 Ind. 78, 80.

In the case of *Miller v. Miller*, *supra*, at page 608, the court said: “Every complaint must proceed upon some single, definite theory. This theory can be gathered only from the general scope and tenor of the pleading. Whether a complaint charges a wilful tort, or negligent act, must be

determined from the language used by the pleader. The pleading cannot proceed upon more than one theory, and if it does, the court may construe it as proceeding upon the theory most apparent and most clearly authorized by the facts stated, and require the case to be tried upon that theory.”

In the case of *Gregory v. Cleveland, etc., R. Co.* (1887), 112 Ind. 385, it is said: “There is a clear distinction between cases which count upon negligence as a ground of action and those founded upon acts of aggressive wrong or wilfulness, and a pleading should not be tolerated which proceeds upon the idea that it may be good either for a wilful injury or as a complaint for an injury occasioned by negligence. It should proceed upon one theory or the other, and is to be judged from its general tenor and scope.” In the same case, at page 387, it is said: “It is only necessary to charge, in a complaint which seeks redress for a wilful injury, that the injurious act was purposely and intentionally committed, with the intent wilfully and purposely to inflict the injury complained of.”

In the case of *Louisville, etc., R. Co. v. Schmidt* (1886), 106 Ind. 73, 74, it is said: “A pleading is to be judged from its general scope, and not from detached phrases or epithets cast into it.” To the same general effect are the following cases: *Phoenix Ins. Co. v. Rogers* (1894), 11 Ind. App. 72, 75; *Hasselman v. Japanese Develop. Co.* (1891), 2 Ind. App. 180, 188; *Carter v. Lacy* (1891), 3 Ind. App. 54, 57; *Cleveland, etc., R. Co. v. Stuart* (1900), 24 Ind. App. 374; *F. C. Austin Mfg. Co. v. Clendenning* (1899), 21 Ind. App. 459; *Terre Haute, etc., R. Co. v. McCorkle* (1895), 140 Ind. 613, 622; *Chicago, etc., R. Co. v. Bills* (1885), 104 Ind. 13, 16; *Bremmerman v. Jennings* (1885), 101 Ind. 253, 257; *Western Union Tel. Co. v. Reed* (1884), 96 Ind. 195, 198; *Speeder Cycle Co. v. Teeter* (1897), 18 Ind. App. 474; *Richardson v. League* (1899), 21 Ind. App. 429; *Mescall v. Tully* (1883), 91 Ind. 96, 99.

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“To constitute a wilful injury, the act which produced it must have been intentional, or must have been done under such circumstances as evinced a reckless disregard for the safety of others, and a willingness to inflict the injury complained of. It involves conduct which is *quasi-criminal*.” *Louisville, etc., R. Co. v. Bryan* (1886), 107 Ind. 51.

The breaking of the tile is declared to have been done negligently and wilfully. As we have seen, the injury could not have resulted from both negligence and wilfulness, and it is for the court to determine the theory of the complaint from its tenor and scope, without reference to the characterization of the act complained of. In this we are not greatly

aided by the averments of the complaint. It is not
3. shown in what manner the tile was broken, nor the means employed in breaking it, but it is averred that it was broken under the main track, and upon the appellee's right of way. This, as well as the fact that the word “negligently” is given precedence, would seem to negative the idea of wilfulness. It is highly improbable that appellee would seek to injure appellant at a place and in a manner involving danger and inconvenience to it, when the same thing might have been done more easily elsewhere on the right of way. We are, therefore, constrained to hold that the words “wilfully and purposely” do not control, but that the complaint is one for injury occasioned by negligence. *Miller v. Miller, supra*; *Chicago, etc., R. Co. v. Hedges* (1886), 105 Ind. 398; *Cleveland, etc., R. Co. v. Asbury* (1889), 120 Ind. 289; *Louisville, etc., R. Co. v. Schmidt* (1886), 106 Ind. 73; *Sherfey v. Evansville, etc., R. Co.* (1890), 121 Ind. 427.

The question for determination is, Does the complaint state a cause of action for negligence? It is elemental that

in such actions the complaint must allege a duty
4. owing by the defendant to the complaining party, or state facts from which the law will imply such duty. It is also necessary to state that the party bound to perform

the duty had knowledge, actual or constructive, of such duty. Negligence being the unintentional failure to perform a duty, required or implied by law, knowledge is an essential element. If there is no duty, there can be no negligence, and even if there is duty, without knowledge of the facts giving rise to the duty, there can be no negligence. *Buck v. Foster* (1897), 147 Ind. 530, 62 Am. St. 427.

The complaint only states that before the construction of appellee's railroad there was a good and sufficient tile-drain from the lands of appellant through the lands of
5. another, and thence to the outlet; that, at a subsequent date, appellee broke down the tile under its main track, and on its right of way, and also filled up the drain. It is not shown how or from whom the right of way was obtained, nor that appellee had any knowledge of the existence or the location of the tile-drain. No contractual or prescriptive right is claimed by appellant, and it does not appear that the ditch was a natural watercourse, or a public drain.

The evident theory of the complaint is that appellee, having come into possession of a right of way across which a private tile-drain extended, and through which appel-
6. lant secured an outlet for the surface-water accumulating upon his lands, was bound to keep such tile-drain in working order, for the benefit of appellant. The law does not impose such a burden upon appellee.

This subject was fully discussed in the well-considered case of *Cleveland, etc., R. Co. v. Huddleston* (1899), 21 Ind. App. 621, 69 Am. St. 385, and the principle stated as follows: "An artificial waterway may not be constructed or maintained, except by authority of law, or under a contract, in any case where it imposes a burden upon the property of an adjacent owner." In the same case, at page 625, the court quoted with approval the following, from *O'Connor v. Fond du Lac, etc., R. Co.* (1881), 52 Wis. 526, 9 N. W. 287, 38 Am. Rep. 753: "The company has only obstructed a

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ditch which drained or carried off surface-water from the plaintiff's premises. We do not think the defendant was bound to keep that ditch open on its own land for the convenience of the plaintiff; in other words, the owner of land is under no legal obligation to provide a way for the escape of mere surface-water coming onto his land from the land of his neighbor, but has the right to change the surface of the ground so as to interfere with or obstruct the flow of such water." See, also, *Jean v. Pennsylvania Co.* (1894), 9 Ind. App. 56; *New York, etc., R. Co. v. Speelman* (1895), 12 Ind. App. 372; *Cairo, etc., R. Co. v. Stevens* (1881), 73 Ind. 278, 38 Am. Rep. 139; *Clay v. Pittsburgh, etc., R. Co.* (1905), 164 Ind. 439; *Atchison, etc., R. Co. v. Hammer* (1879), 22 Kan. 763, 31 Am. Rep. 216.

The complaint does not state a cause of action, and there was no error in carrying back and sustaining a demurrer thereto.

Judgment affirmed.

CHICAGO AND EASTERN ILLINOIS RAILROAD COMPANY v. COON.

[No. 6,858. Filed January 12, 1911. Rehearing denied June 27, 1911. Transfer denied November 22, 1911.]

1. NEGLIGENCE.—*Complaint.*—*Essentials.*—A complaint cannot be aided by other parts of the record, must contain every material fact, must not be equivocal and must show that the acts complained of were the proximate cause of the injuries sustained. p. 679.
2. RAILROADS.—*Crossings.*—*Failure to Give Signals.*—The failure of a railroad company to cause the whistle of its train to be sounded at a crossing constitutes negligence *per se.* pp. 680, 686.
3. APPEAL.—*Briefs.*—*Mistake.*—*Railroads.*—*Negligence.*—Where the record shows that the plaintiff's complaint alleged that "owing to said negligence and reckless high rate of speed" the plaintiff sustained injuries, the appellant's contention that the averment "owing to said negligent and reckless high rate of speed," etc., shows but one act of negligence as the proximate cause of the injury, falls for lack of support. p. 680.
4. NEGLIGENCE.—*Contributory.*—*Negating.*—*Complaint.*—Since

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- 1899 (Acts 1899 p. 58, §362 Burns 1908) a complaint for negligence need not negative contributory negligence. p. 682.
5. RAILROADS.—*Crossings.—Complaint.*—A complaint alleging that the plaintiff in driving along a street approached a railroad crossing, that he checked his horses, looked and listened but neither saw nor heard a train, that the night was dark and stormy, that when he arrived upon the track the defendant negligently ran its train without signal, noise or headlight, and at an excessive speed against him, to his damage, states a cause of action. p. 682.
6. APPEAL.—*Assignments of Errors.—Instructions.*—Errors in giving or refusing instructions cannot be assigned independently on appeal. p. 683.
7. APPEAL.—*Weighing Evidence.*—The Appellate Court will not weigh conflicting evidence; and if there is any evidence tending to prove the material facts, the judgment will not be disturbed. pp. 683, 686.
8. NEGLIGENCE.—*Several Acts.—Proof of One.*—Where several acts of negligence are alleged in the complaint, proof of one is sufficient. p. 684.
9. RAILROADS.—*Crossings.—Running Train Without Headlight.*—The running of a train, without a headlight, on a dark night, through a town, proximately causing an injury to a traveler on a crossing, constitutes negligence. p. 685.
10. RAILROADS. — *Crossings. — Injuries. — Evidence. — Contributory Negligence.*—The fact that a traveler stopped his horses on the railroad crossing just before he was struck does not make him guilty of contributory negligence as a matter of law, where the night was dark and stormy and the train approached noiselessly without a headlight and without signaling. p. 686.
11. APPEAL.—*Joint Assignments.—New Trial.—Instructions.*—Where instructions are jointly challenged in a motion for a new trial, the assignment is unavailing unless they are all bad. pp. 687, 688.
12. APPEAL.—*Briefs.—Waiver.*—A failure to argue alleged errors constitutes a waiver thereof. p. 688.
13. TRIAL.—*Instructions.—Duplication.*—Instructions requested, covered by those given, should be refused. p. 688.
14. TRIAL.—*Instructions.—How Considered.*—Where instructions when considered as a whole fairly state the law, the court on appeal will not disturb the judgment, though the phrasing thereof might be improved upon. p. 689.
15. APPEAL.—*Rehearing.—New Points.*—Points not presented at the original hearing of a case on appeal cannot be presented on a petition for a rehearing. p. 689.

From Newton Circuit Court; *Charles W. Hanley*, Judge.

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Action by Percy Coon against the Chicago and Eastern Illinois Railroad Company. From a judgment for plaintiff, defendant appeals. *Affirmed.*

William Darroch, Frank M. Ross, Homer T. Dick, Ulric Z. Wiley and Arthur H. Jones, for appellant.

W. H. Parkinson, John A. Dunlap, Frank Davis and Fred Longwell, for appellee.

HOTTEL, J.—This is an action brought by appellee against appellant to recover damages on account of injuries sustained by appellee by being struck by one of appellant's trains at a crossing of appellant's track with one of the streets of the town of Brook.

The complaint is in one paragraph, to which a demurrer was filed and overruled, and the issues closed by an answer in general denial. There was a trial, resulting in a verdict for appellee in the sum of \$1,500. Motion for a new trial was overruled, and defendant excepted. Judgment was rendered on the verdict.

Appellant relies for reversal on the following errors: “(1) The complaint does not state sufficient facts; (2) overruling appellant's demurrer to the complaint; (3) giving instruction two, on the court's own motion, and also instructions one, two, four, five and six, requested by appellee; (4) refusing to give instructions five and seventeen, requested by appellant; (5) overruling appellant's motion for a new trial; (6) sustaining appellee's motion for a judgment on the verdict.”

Inasmuch as errors one and two present the question of the sufficiency of the complaint, we shall state the material averments thereof. The complaint alleges, in substance, that said railroad crosses, at an angle of about forty-five degrees, a street in the town of Brook, running east and west; that the street is sixty feet wide, and the railroad runs northwesterly and southeasterly; that a number of buildings and trees obstruct the view of the track as it is approached

from the west; that on January 18, 1907, appellee, who was driving a two-horse, single-seated, covered buggy, approached the railroad from the west; that when about one hundred feet from the crossing of said street and approaching it, he checked his horses, and drove in a slow walk, listening and looking for approaching trains; that he continued to look and listen while approaching said railroad crossing; that on approaching said crossing from the north, there is a slight incline towards the south; that on said date and about 8:30 o'clock at night, there was a brisk wind blowing from the southwest; that when approaching said crossing, and while continuing to look and listen, and hearing no signals given, and seeing no light, plaintiff started to drive upon and across the track of this defendant; that as plaintiff's horses were upon the track, said defendant carelessly and negligently ran a train of cars on its said road from the northwest, coming down said grade and within said limits of said incorporated town at the reckless speed of twenty-five miles an hour; that the steam was entirely shut off; that the agents and servants, in the operation and management of defendant's said train, carelessly and negligently failed to sound the whistle or ring the bell, and carelessly and negligently operated said engine without any sufficient headlight, and ran said train at a dangerous, reckless and unusual rate of speed, to wit, thirty-five miles an hour, at the time it struck said buggy and horses and injured this plaintiff; that they carelessly and negligently failed to give any signal whatever of the approaching train; that, by reason of the surrounding obstructions, of the noise made by the wind, of the steam being shut off of said engine, and of the rapid and great speed at which said train was running, it did not make sufficient noise in advance thereof to be heard for any distance; that said train approached said crossing in said careless and negligent manner as aforesaid, and when plaintiff's team was upon said tracks of said defendant said plaintiff avers "that owing to said negligence

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and reckless high rate of speed at [which] said train was running, he was unable to get his horses and buggy out of reach of said train, but that defendant's agents and servants so operated said train, and so negligently and carelessly ran it upon and against plaintiff's said team and buggy, that the end of the pilot of said locomotive engine struck plaintiff's said team and buggy with great force and violence," thereby throwing and hurling this plaintiff a great distance, thereby greatly and severely bruising and injuring him; that said injuries were occasioned by the negligence of said defendant, and without any fault or negligence on the part of this plaintiff.

As heretofore indicated, the first and second errors assigned by appellant bring in review this complaint. The disposition of the second—the overruling of the demurrer to the complaint—necessarily disposes of the first—that the complaint does not state sufficient facts.

Counsel for appellant have quoted the following propositions of law as applicable to the error assigned: (1) "When

a pleading is tested by a demurrer, it must stand or

1. fall by its own averments. It can find neither weakness nor strength from other parts of the record."

(2) "In pleading, it is incumbent upon the plaintiff to state all facts essential to a cause of action, and if any material fact is lacking the complaint will go down before a demurrer." (3) "It is an old and well-settled rule of

pleading, that where doubts arise upon the pleading they are construed most strongly against the pleader." (5) "In

cases like the one under consideration, it must appear, from the material facts, directly averred in the complaint, that there was some connection, in the way of cause and effect, between the acts of negligence complained of and the injury, or that such negligent acts of omission or commission * * * resulted in the injury complained of, and which result was the consequence of such negligent acts."

These propositions correctly state the law, but do not

state the law in its entirety applicable to the determination of the sufficiency of this complaint. There are other

2. principles equally important, and necessary to be kept in mind, before adjudging this complaint bad on the grounds urged by counsel for appellant. The first objection urged against the complaint is as follows: "The demurrer to the complaint should have been sustained, because it is not averred that the imputed negligence of appellant caused the injury complained of." In discussing the objection, counsel treat the complaint as though it proceeded wholly upon the theory that the only negligent acts of omission or commission of the appellant complained of by the appellee related solely to the speed of the train. Counsel leave out of account the allegations relating to appellant's failure to give the signals required by statute, and those relating to the insufficiency of the headlight used upon the train. These are important allegations, in view of the holdings of this court and the Supreme Court. The giving of the signals is required by statute, and as a general proposition, the failure of a railroad company to discharge its duty in regard to giving the signals at public crossings is negligence *per se*. §5431 Burns 1908, §4020 R. S. 1881; *Baltimore, etc., R. Co. v. Conoyer* (1898), 149 Ind. 524, 526; *Pittsburgh, etc., R. Co. v. Burton* (1894), 139 Ind. 357, 375, 380.

In commenting upon the section of the statute requiring the signals to be given, the Supreme Court in the case of *Pittsburgh, etc., R. Co. v. Burton, supra*, at page 375, said: "This statute expresses the legislative definition of the character and extent of warning which shall be required, and less than the warning required is not deemed reasonable, and constitutes negligence."

While it is true that the allegation in the complaint, with reference to the insufficient headlight, is in the nature of a conclusion, the averments of the complaint in relation

3. to the negligent failure of the appellant to give the signals required by statute and the causative connec-

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tion of this failure with appellee's injury, we think makes the complaint sufficient in this regard. The law in this class of cases seems to be well settled, but a more serious difficulty arises in its application to the particular case. It seems from the statement of the contents of the complaint in appellant's brief that counsel have labored under a misunderstanding as to its wording. The complaint, in charging the negligence of appellant that caused appellee's injuries, uses the following language: "Plaintiff avers that owing to said negligence and reckless high rate of speed at [which] said train was running, he was unable to get his horses and buggy out of reach of said train, but that defendant's agents and servants so operated said train, and so negligently and carelessly ran it upon and against plaintiff's said team and buggy, that the end of the pilot of said locomotive engine struck plaintiff's said team and buggy with great force and violence," thereby injuring, etc.

The appellant in its brief charges the language of the complaint upon this same subject to be as follows: "Plaintiff avers that owing to said 'negligent' and reckless high rate of speed said train was running," etc. While but one word of this sentence is incorrectly quoted, a complete change in meaning results. Under the wording of the complaint, as counsel for appellant understand and quote it, the sole and only proximate cause of plaintiff's injury was the negligent and reckless high rate of speed at which said train was running; while, under the correct wording of the complaint, as shown by the record, the proximate cause was said "negligence" and reckless high rate of speed at which said train was running. The pleader, in fact, connects and includes the negligent acts before enumerated in this complaint with the speed of the train as the proximate cause of the injury. With this interpretation of the complaint the argument of counsel in their brief, as to its insufficiency, has little left to support it, because said negligent acts before set out in the complaint include the negligent omissions of appellant to

give the signals or warning required by statute, the defective headlight, etc., which we think makes the complaint sufficient under the rules of this court before quoted.

Counsel for appellant also insist that the complaint should have alleged that if the warning had been given the injury would not have occurred; or that there should have

4. been an averment that appellee could have seen the train had there been a sufficient light, and heard it if the required signal had been given. Upon this proposition counsel have cited numerous authorities, most of which, however, are cases antedating the act of 1899 (Acts 1899 p. 58, §362 Burns 1908), that shifted the burden of the issue of contributory negligence in actions of this character. *Chicago, etc., R. Co. v. Turner* (1904), 33 Ind. App. 264.

Prior to that act, it was necessary for the plaintiff either by his special averments to show or by a general averment to allege that he was without fault, and in nowise contributed to his injury. *Baltimore, etc., R. Co. v. Young* (1896), 146 Ind. 374, 376; *Chicago, etc., R. Co. v. Thomas* (1897), 147 Ind. 35; *Cincinnati, etc., R. Co. v. Voght* (1901), 26 Ind. App. 665.

But since the act of 1899, *supra*, it is only necessary in actions of this kind that the facts pleaded do not affirmatively show contributory negligence. *Southern R. Co. v. Davis* (1905), 34 Ind. App. 377; *Greenawaldt v. Lake Shore, etc., R. Co.* (1905), 165 Ind. 219; *VanWinkle v. New York, etc., R. Co.* (1905), 34 Ind. App. 476.

Measured by this test, the complaint in this particular is sufficient. It contains no averments affirmatively showing

that appellee by his negligence contributed to his

5. injury; but it does contain a general averment that the “injuries were occasioned by the negligence of said defendant, and without any fault or negligence on the part of this plaintiff.” Taking the complaint as a whole, we

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think it states facts sufficient to constitute a cause of action, and that the demurrer thereto was properly overruled.

Error in giving or refusing to give instructions is not properly presented by an assignment of error, assigning the giving or refusal to give such instructions as error;

6. but such error must be stated as one of the grounds for a new trial. The third and fourth assignments of error need not, therefore, be considered.

Under the fifth error assigned, counsel insist that the verdict is not sustained by sufficient evidence and is contrary to law. The argument of counsel for appellant

7. upon this branch of the case is predicated upon the facts that the witnesses who gave opinions as to the speed of the train generally put it at from "four to eight miles an hour," that the plaintiff had an open and unobstructed view of the track from any point inside the right of way extending forty feet west of the track for 325 feet in the direction from which the train approached, that both the appellee and the train were moving slowly while approaching the crossing, and that appellee stopped on the track, and was looking and listening when he was struck by appellant's train. Much of what we have already said in relation to the sufficiency of the complaint applies with equal force to this reason for a new trial. Following their mistaken notion of the allegations of the complaint, counsel leave out of account entirely the fact that there were several witnesses who testified to facts that tended to show that appellant's trainmen failed to give the statutory signals, and that there was proof that the headlight was so defective that it had the appearance of a switch light or a lantern, and reflected but little light on the rails. In this connection we deem it proper to quote from the testimony of some of the witnesses.

One witness, who was going in the direction of the train, and watching for it, and who met it near the whistling post,

and had every opportunity to hear the signals, testified that he heard no signals, either before or after the train passed him. This witness said: “I observed there was not much of a headlight, *scarcely any*; that is what fooled me. I saw the light, *but thought it was a switch light*. The light was very dim, *it did not make as much light as an ordinary lantern*. The train was almost on me before I saw it.” (Our italics.)

Another witness testified that he did not hear the bell, and that he “observed the headlight at Brook. Could not see there was any light there unless you got straight in front of the engine. The bull’s-eye was smoky.”

Another witness testified as follows: “In fact, I thought they had no headlight. I stepped on the pilot and looked at the headlight. The lamp was an ordinary kerosene burner, and it was smoked down to within an inch and a half of the lower part of the globe, black as my hat. * * * You could not observe a blaze, standing in front of the engine there. There was absolutely no reflection on the rails. * * * The lower inch and a half of the globe was not smoked; the rest was perfectly black.”

Another witness testified as follows: “Stepped in front of engine. Saw glass, smoky and dirty from some cause, and the light was very indistinct. Did not seem to be any more light than from an ordinary lamp.”

There were other witnesses who testified that they did not hear any signals given. But in view of the well-established rule of this court, that indulges all presumptions in favor of, rather than against, the general verdict, and sets it aside only where there is a total failure of evidence on some material issue, we deem it useless to quote further from the evidence.

Two of the negligent acts charged as being the proximate cause of appellee’s injury, were the failure to give

8. the statutory signals and the imperfect headlight used on the engine, and these, together with the speed

of the train, constituted the negligent acts of the appellant, complained of. In view of the evidence before referred to, we do not think the speed of the train controlling in this case, but there was evidence from which the jury may have concluded that the speed of the train was faster than the witnesses thought it was. But for the purposes of this case, we think it was enough if the jury believed from the evidence that the statutory signals were not given, and that the headlight was of the character testified to by the witnesses. Proof of every averment in the complaint is not always necessary. This is true, we think, in the case before us.

We think the case of *Indiana Clay Co. v. Baltimore, etc., R. Co.* (1903), 31 Ind. App. 258, is in point in this case. In that case this court uses the following language: "Proof of either act of negligence charged, if it was the proximate cause of the injury, was sufficient." This case was tried on the theory that proof of either act of negligence charged, if it was the proximate cause of the injury, was sufficient, and this theory was adopted and acquiesced in by appellant, as evidenced by instruction four, tendered by it and given by the court, which is as follows: "Plaintiff's complaint avers four separate acts of negligence on the part of defendant, one or more of which negligent acts must be proved by the preponderance of the evidence, and if you believe from the evidence that plaintiff has failed to prove defendant's failure to comply with the statutory sounding of the whistle and ringing of the bell as the train approached the station at Brook, and that the headlight was burning, even if but dimly, and that the speed of the train was not unreasonable at the time of the collision with plaintiff's vehicle and team, then your verdict should be for defendant."

To run a railroad train, on a dark night, without a headlight, across a much-traveled public highway or street, in a town, might of itself be an act of negligence; and

9. if such negligence resulted in injury to a traveler who was attempting to cross the track, and who was

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himself without fault, and who was injured solely because of such negligence of the railroad company, without in any way contributing to such injury, such company would be liable. 23 Am. and Eng. Ency. Law (2d ed.) 757; *East St. Louis, etc., R. Co. v. O'Hara* (1894), 150 Ill. 580, 37 N. E. 917; *Ohio, etc., R. Co. v. Hill* (1893), 7 Ind. App. 255, 260.

The failure to give the statutory signals at railway crossings is negligence *per se*, and renders the railroad company liable for injuries to persons caused by such failure,

2. where such person is himself without fault, and in nowise contributed to such injury. *Pittsburgh, etc., R. Co. v. Burton, supra*; *Baltimore, etc., R. Co. v. Conoyer, supra*.

If there is any evidence to support each of the material allegations of the complaint upon which the verdict is rendered, this court cannot grant a new trial on the

7. ground that the evidence was insufficient. *Robbins v. Spencer* (1895), 140 Ind. 483, 487; *Stanton v. Kendrick* (1893), 135 Ind. 382.

In view of the evidence before quoted, and the rule of law expressed, this court cannot say that there was no evidence tending to support the verdict; nor can it say, as a

10. matter of law, that appellee was guilty of contributory negligence. This is so, notwithstanding appellee's own statement, that he stopped on the track, and was looking and listening for a train when hit by it. There was no evidence showing that appellant, at the time he stopped, knew that he was in fact stopping on the track, and the jury may have concluded from the other evidence in the case that, on account of the dark and stormy condition of the night, appellee did not know nor realize that his horses were on the track until it was too late to get off after discovering the approaching train.

There was also evidence by some of the witnesses to the effect that since the injury appellee's memory has been bad,

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and his mind has been affected. It is so improbable that a person in his right mind would deliberately or knowingly stop his team upon the railroad track in front of an approaching train, that the jury doubtless concluded from the evidence that appellee either did not know that his team was on the track when he stopped, or that when he saw the approaching train he became excited, and in a moment of indecision stopped his team, not knowing whether to go forward or backward; or they may have concluded that, from lack of mind or memory, he failed to give an accurate account of what happened at the time of his injury. In any event, the jury had a right to take into account all the evidence as to the conditions and surroundings of appellee on the night of his injury—the darkness of the night, the wind and the rain, the obstructions to his view, the evidence upon the subject of the appellant's failure to give the statutory signals, the evidence that the train was moving down grade with little or no steam, and making no noise that could be heard any great distance, and that appellant was operating said train with a headlight that was calculated to mislead and deceive the traveler about to cross the tracks, rather than to warn him of the approaching train—these facts were all testified to by witnesses, and were proper matters to be considered by the jury in determining the proximate cause of the injury to appellee, and whether he contributed thereto. The conclusion to be drawn from this evidence was, to put it most favorably to appellant, one about which honest men might differ. In such case the verdict should not be disturbed by this court.

Reasons four, five and six for a new trial relate to the instructions given in the case. The ground for a new trial

that calls in question the instructions given by the

11. court on its own motion is joint, and is not argued by counsel. It is well settled by the decisions of this court and the Supreme Court, that unless all the instructions jointly alleged to be erroneous are bad, the contention that

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one is bad is not available. *Central Union Tel. Co. v. Sokola* (1905), 34 Ind. App. 429; *Osborn v. State* (1905), 164 Ind. 262.

By their failure to argue any of the instructions given by the court upon its own motion, and to point out defects in any of them, counsel admit their correctness. *Young* 12. *v. Montgomery* (1903), 161 Ind. 68; *Terre Haute, etc., R. Co. v. Brunker* (1891), 128 Ind. 542; *Louisville, etc., R. Co. v. Williams* (1898), 20 Ind. App. 576.

What we have said as to grounds for a new trial, relating to instructions given by the court on its own motion, applies with equal force to grounds therefor relating to 13. the refusal to give those tendered by appellant. Instruction five, tendered by appellant and refused by the court, was in all its material and essential parts covered by instruction two, given by the court upon its own motion, and instruction six, given at the request of the appellant, so that there was no error in refusing instruction five.

11. This being true, the joint assignment of error as to the instructions refused, under the authorities cited, would not avail counsel anything. But we have examined instruction seventeen, asked for by appellant and refused, and are of the opinion that no error was committed

13. by refusing it, because so far as it was proper, and expressed an accurate statement of the law, it was covered by other instructions given by the court, and especially by instruction fourteen, given at the request of appellant. By ground four of its motion for a new trial, counsel assign as error the giving by the court of "each of the several instructions" requested by appellee. These instructions are lengthy, and we deem it unnecessary to encumber this opinion with a copy of them. Counsel's objection to appellee's first instruction—"that it failed to require the jury to find that when appellee looked and listened he failed to see and hear"—if tenable, is met by the clause, immediately following the requirement to look and listen, that required

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the jury to find that appellee then “used care commensurate with the danger.” There were also other instructions, given at the request of the appellant, that presented this phase of the case as favorably to appellant as the law warrants. Appellee’s second instruction, complained of by appellant, sets out the act requiring the statutory signals, and comments thereon, which comments seem to be an exact copy of the expression of our Supreme Court in relation thereto, in the case of *Pittsburgh, etc., R. Co. v. Burton, supra*, at pages 375, 376. Instruction four, given at the request of appellee and complained of by appellant, is in substance an exact copy of an instruction held sufficient by the Supreme Court in the case of *Terre Haute, etc., R. Co. v. Brunner, supra*, at pages 551, 552, and is not subject to the objection urged by counsel. Instruction number six, in its essential features, is a copy of the language quoted with approval by this court in the case of *Louisville, etc., R. Co. v. Williams, supra*, at page 583.

We have examined all the instructions given in this case, and, taking them as an entirety, their statement of the law is substantially correct, and as favorable to appellant 14. as the authorities warrant. The objections made thereto suggest no prejudicial error in giving or refusing to give any of them. We have considered all the errors assigned and discussed by appellant’s counsel in its brief, and find that no error was committed that prejudiced the rights of appellant.

Judgment affirmed.

ON PETITION FOR REHEARING.

HOTTEL, J.—A petition for rehearing has been filed in this case, supported by a brief more elaborate and covering more points than presented by appellant in its original 15. brief herein. The earnestness and ability with which the questions involved in this petition have been ar-

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gued by counsel on both sides, have led us to a careful re-examination of such of these questions as were presented by appellant in its original brief. We find no ground for changing the original opinion. We should say in this connection, however, that in this petition, counsel present some points not included in the original statement of points, nor referred to in the argument thereof, and which, under the rules of this court, cannot now be considered.

This is particularly true as to instruction four, tendered by appellee and given by the court. It is now insisted that this instruction is objectionable, because it authorizes the jury, in assessing damages, to include therein elements not within the issues and the evidence. The only objection urged to this instruction in the original brief was that by it (we quote from appellant's points and authorities) "the jury was directed to find for appellee, without being required to find that the negligence imputed to appellant contributed to or was the proximate cause of the injury." The instruction was not open to the objection then urged against it, and was approved only as against that objection. As against said objection, the instruction was a correct expression of the law, and was supported by authority, as shown in the original opinion.

A rehearing cannot be granted on a point not made nor referred to in the original briefs. *Cleveland, etc., R. Co. v. Lindsay* (1904), 33 Ind. App. 404; *Indiana Power Co. v. St. Joseph, etc., Power Co.* (1902), 159 Ind. 42; *Armstrong v. Hufty* (1901), 156 Ind. 606; *City of Evansville v. Senhenn* (1898), 151 Ind. 42.

Petition overruled.

MALON v. SCHOLLER.

[No. 7,631. Filed November 24, 1911.]

1. PLEADING.—*Answer.—Demurrer to.—Form.*—A demurrer to a paragraph of answer on the ground that such paragraph “does not state facts sufficient to constitute an answer in said cause,” presents no question. p. 693.
2. PLEADING.—*Paragraphs of Answer.—Facts Provable Under Another.—Demurrer.*—It is harmless error to sustain a demurrer to a paragraph of answer, where the facts therein alleged are provable under another paragraph. p. 693.
3. VENDOR AND PURCHASER.—*Vendor's Liens.—Subsequent Purchasers.—Notice.—Special Findings.*—Special findings in a suit to establish and to enforce a vendor's lien, that prior to the conveyance of the real estate in question to defendant “he had notice and knowledge of said notes due to plaintiff * * * which were claimed to be notes as a part of the purchase money of said real estate,” are insufficient to show that defendant had notice that such notes evidenced a part of the purchase price of such real estate; and the burden being on plaintiff to establish such fact, the findings do not support a decree in her favor. p. 694.
4. APPEAL.—*Mandate.—Reversal.—New Trial.*—Though appellant is technically entitled to a judgment on the special findings, where the interests of justice require, a new trial will be ordered on a reversal. p. 695.

From Hancock Circuit Court; *Robert L. Mason*, Judge.

Suit by Caroline Scholler against Edward Malon. From a decree for plaintiff, defendant appeals. *Reversed.*

Williams & Schlosser and *Walker & Van Duyn*, for appellant.

Ephraim O'Harra and *James D. Ermston*, for appellee.

ADAMS, J.—Suit by appellee against appellant to establish and enforce a vendor's lien on real estate. It is alleged in the complaint that on June 15, 1891, Frederica Lang was the owner of a tract of land in Hancock county, Indiana, and on said day she sold and conveyed it, by warranty deed, to her son, Herman Lang, reserving to herself a life estate therein; that the grantee, in consideration of said convey-

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ance, assumed the payment of a mortgage of \$500 on said real estate, and agreed to pay plaintiff, Caroline Scholler, daughter of the grantor, the sum of \$500, as the remainder of the purchase price, which agreement was evidenced by two notes of \$250 each, payable in one and two years after the death of Frederica Lang; that after the execution and delivery of the notes, Herman Lang sold and conveyed said real estate to defendant, Edward Malon; that at the time Edward Malon contracted for and purchased said real estate he had knowledge of plaintiff's claim, and knew that said claim was for unpaid purchase money, and that plaintiff had a lien on said real estate for the amount thereof; that defendant knew of the insolvency of his grantor, and agreed, as a part of the consideration, to pay said notes at maturity. Other averments of the complaint are not controverted.

To this complaint defendant filed an answer in two paragraphs. The first was an answer in general denial. The second paragraph averred that defendant purchased the real estate in good faith, without any knowledge or notice that plaintiff had, or claimed to have, any notes against Herman Lang, or any claim or lien on said real estate; that he took said real estate subject to the life estate of Frederica Lang, and subject to certain mortgage and judgment liens, and paid the balance in cash to said Herman Lang, the amount assumed and the amount paid being the full value of said real estate.

Appellee demurred to the second paragraph of answer, on the ground that said paragraph "does not state sufficient facts to constitute an answer in said cause." This demurrer was sustained. Upon request the court made a special finding of facts, and stated conclusions of law thereon favorable to appellee. A decree was entered on the conclusions of law.

The errors relied on for reversal and not waived are that the court erred (1) in sustaining the demurrer of appellee

to the second paragraph of answer, (2) in its conclusion of law number one, upon the special finding of facts, and (3) in its conclusion of law number two upon the special finding of facts.

The first error assigned must be held to be well taken, for the reason that the form of the demurrer is insufficient.

Section 351 Burns 1908, §346 R. S. 1881, provides

1. that where the facts stated in any paragraph of answer are not sufficient to constitute a cause of defense, the plaintiff may demur to it, under the rules prescribed for demurring to a complaint. It frequently has been held that a demurrer to an answer is insufficient, when it is based upon the failure to state facts sufficient to constitute an answer. *Thomas v. Goodwine* (1882), 88 Ind. 458; *Wintrobe v. Renbarger* (1898), 150 Ind. 556; *Wade v. Huber* (1894), 10 Ind. App. 417, and cases cited; *City of Tell City v. Bielefeld* (1898), 20 Ind. App. 1.

But while the sustaining of this demurrer was technically erroneous, the error is not available, for the reason that the answer to which it was addressed contained no aver-

2. ments of fact that could not have been introduced under the first paragraph of answer, that was in general denial. *Cincinnati, etc., R. Co. v. Smith* (1891), 127 Ind. 461, 464; *Board, etc., v. State, ex rel.* (1897), 148 Ind. 675; *Kidwell v. Kidwell* (1882), 84 Ind. 224, 228; *McCloskey v. Davis* (1893), 8 Ind. App. 190, 193, and cases cited.

The facts found by the court are as follows: On June 15, 1891, Frederica Lang sold the real estate described in the complaint to her son Herman Lang, for the sum of \$1,500, subject to a mortgage of \$500, and subject to the life estate of the grantor. As a part of the purchase money, said Herman was to pay appellee, Caroline Scholler, daughter of Frederica Lang, a certain part of said purchase money, thereafter to be agreed on. On February 20, 1897, Herman Lang agreed to pay appellee the sum of \$500, as the balance of the purchase money for said real estate, which amount

was evidenced by two notes for \$250 each, due in one and two years after the death of Frederica Lang, without interest. Frederica Lang died August 11, 1907. On February 11, 1897, Herman Lang executed a mortgage on said real estate to Edward Fink, for \$612. On February 20, 1899, Herman Lang and his wife sold and conveyed to appellant by warranty deed the real estate in question, for a stated consideration of \$1,150, subject to the encumbrances on said real estate, and subject to the life estate of Frederica Lang.

The only facts found by the court with reference to notice are as follows: "That prior to the date of the conveyance of said real estate by Herman Lang and wife to defendant, Malon, he had notice and knowledge of said notes due to plaintiff, Caroline Scholler, which were claimed to be notes as a part of the purchase money of said real estate."

Appellee, having based her claim to the real estate owned by appellant upon notice which appellant had of her lien at the time of the purchase, the burden was on appellee to prove that appellant took the real estate not only with notice of her notes, but with notice of her claim that such notes were for purchase money, and constituted a lien on the land.

A failure of the court to find as a fact that the purchaser had such notice, is a finding against the party having the burden of proving notice. The finding clearly shows that Malon had notice and knowledge of the notes due Caroline Scholler, but it does not follow that the words "which were claimed to be notes as a part of the purchase money of said real estate" must be taken to mean that Malon had notice and knowledge of such claim. This was the important element in the controversy. The right of appellee to establish her lien depended upon her proof that appellant had notice of the notes and that they were executed for purchase money. If the purchaser had knowledge of the notes and no knowledge of the circumstances under which they were executed,

or of the consideration evidenced by them, then the findings of fact did not support the conclusions of law.

That the court stated conclusions of law favorable to appellee on a question so elemental, gives us cause to doubt whether the language used in the finding in regard to

4. notice was expressive of the meaning intended. If

the purpose of the court was to find that Malon had such notice and knowledge, then a wrong would be done to appellee by directing the trial court to restate its conclusions of law, and render judgment for appellant. We are satisfied that the ends of justice would best be served by granting a new trial, wherein, if requested, the facts might be found in a manner leaving no room for doubt.

The cause is therefore reversed, with instructions to the trial court to grant a new trial, and for further proceedings in accordance with this opinion.

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[NOTE.—The citation *Wilson v. Jackson Hill Coal, etc., Co.*, 150, 153 (4), indicates that the case begins on page 150, that the point cited is on page 153, and that such point is numbered 4 in the margin.—REPORTER.]

ABATEMENT—

See ACTIONS; PLEADING.

Action.—Death.—Damages.—At the common law an action for personal injuries abated with the death of the injured person.

Wilson v. Jackson Hill Coal, etc., Co., 150, 153 (4).

ACCORD AND SATISFACTION—

Plea of.—Failure to Object to Evidence of.—Notes.—In an action on a note, accord and satisfaction constitutes an affirmative defense that should be answered specially; but a failure to object to evidence thereof, is a waiver of such special plea.

Poer v. Johnson, 596, 598 (2).

ACCOUNTS—

Sales.—Complaint.—Sufficiency.—“Sold.”—A complaint on account alleging that the defendants are “indebted to plaintiff in the sum of \$150, with interest thereon, for hay sold and delivered by plaintiff to said defendants,” and setting out an itemized statement thereof in a bill of particulars, sufficiently shows that a sale was made at the request of defendants, and that a contract was made therefor, the word “sold” importing a contract of sale of some article of value, made upon a valuable consideration, a price paid therefor, and the mutual consent of the parties.

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I. APPELLATE JURISDICTION.

1. *Dismissal.—Street Assessments.*—The Appellate Court has no jurisdiction of an appeal from an order of the circuit court in a street assessment proceeding, where the circuit court had none.
Holderman v. Town of North Manchester, 491, 494 (4).
2. *Parties.—Consent.*—Where an appeal is taken in the name of a decedent, the consent of the appellee to a substitution of decedent's representative as appellant cannot confer jurisdiction over the appeal; and such appeal will be stricken from the docket for want of jurisdiction.
Hallagan v. Johnson, 497, 499 (4).

II. DECISIONS REVIEWABLE.

3. *Transfer.—Constitutional Questions.—Erroneous Decisions.*—Where a case involves a constitutional law question, and where a ruling precedent of the Supreme Court appears erroneous, the Appellate Court will transfer the case to the Supreme Court with an appropriate recommendation.

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APPEAL—Continued.

bill of exceptions, containing the evidence * * * as required by said precipe, and as directed by the plaintiff herein," the bill of exceptions is a part of the record, the direction to include the "evidence" being equivalent to a direction to include the bill of exceptions, which alone contained the evidence, the clerk's certificate curing the defect, if any exists.

Wallace v. Coons, 511, 514 (1), 515 (1).

16. *Transcript.—Complaints.—Identification.—Change of Venue.—Presumptions.*—Where two amended complaints were filed, to one of which a demurrer was sustained, and a change of venue was taken, and the transcript on appeal shows only that the amended complaints were copied without distinction as to date of filing, the Appellate Court is unable to determine on which complaint the trial was had, there being no presumption by which their identity could be determined, and, therefore, no question is presented.
Mesker v. Fitzpatrick, 518.

17. *Record.—Instructions.—Failure to File.*—Where instructions are not brought into the record by a bill of exceptions, and the record fails to show that they were "filed with the clerk of the court at the close of the instruction of the jury" (§561 Burns 1908, Acts 1907 p. 652), they are not a part of the record and cannot be considered. *City of Indianapolis v. Schoenig*, 76, 83 (8).

18. *Transcript.—Failure to Index.*—Appellant's failure to index its transcript so as to show the initial pages of the questioned paragraphs of answer and the demurrers thereto, constitutes a waiver of any alleged errors thereon.

Perpetual Bldg., etc., Assn. v. Stiller, 417, 418 (1).

19. *Failure to Index Transcript.—Dismissal.*—The failure of appellant to index its transcript, after notice of the defect, warrants a dismissal of the appeal; and for such defect the court may dismiss such appeal on its own motion.

Perpetual Bldg., etc., Assn. v. Stiller, 417, 419 (2).

20. *Judgment.—Authority of Attorneys.—Contradicting.*—Where the record shows that attorneys represented defendant and settled his case, his affidavit that they were not authorized will not overthrow the record, where counter-affidavits, as convincing as defendant's, stated that such attorneys were authorized.

Maiben v. Manlove, 617, 621 (3).

21. *Judgment by Agreement.—Contradicting.—Estoppel.*—A judgment for possession and for damages for unlawful detention of real estate, further providing that "in pursuance of the agreement of the parties to this action * * * the writ of ejectment shall not issue under this judgment" until a certain time, affirmatively shows an agreement by the parties to the judgment, and the parties are estopped to prosecute an appeal therefrom after the benefits thereof have been accepted.

Maiben v. Manlove, 617, 621 (4).

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22. The assignment of errors constitutes the appellant's complaint on appeal.
Schrader v. Meyer, 36, 37 (1).

23. *Failure to Present Questions.*—The failure of the appellant to question the sufficiency of an answer in his assignment of errors is fatal to the raising of any question thereon.

Kerbaugh v. Nugent, 43, 46 (1).

APPEAL—Continued.

24. *Instructions.*—Errors in giving or refusing instructions cannot be assigned independently on appeal.
Chicago, etc., R. Co. v. Coon, 675, 683 (6).
25. *Motion to Make More Specific.*—The overruling of a motion to make more specific cannot be considered on appeal, where the assignment of errors does not present such alleged error.
Wah Kee v. Clark, 462, 464 (2).
26. *Exclusion of Evidence.*—*New Trial.*—The exclusion of evidence must be made a ground for a new trial in order to present any question thereon on appeal, and cannot be assigned independently.
Leventhal v. Crampton, 92, 94 (3).
27. *Joint.*—*Several.*—*Husband and Wife.*—Where a landowner and his wife jointly and severally assign errors, on appeal, in a condemnation case, whether such joint assignment and the wife's separate assignment present any question will not be determined where the landowner's separate assignment presents all the questions.
Halstead v. Vandalia R. Co., 96, 98 (1).

IX. BRIEFS.

28. *Waiver.*—Points not discussed are waived.
Chicago, etc., R. Co. v. Coon, 675, 688 (12).
City of Indianapolis v. Schoenig, 76, 78 (1).
Crouch v. Lewis, 465, 469 (8).
Eppert v. Gardner, 188, 191 (3).
Fort Wayne, etc., Traction Co. v. Müller, 633, 640 (4).
Hinshaw v. Security Trust Co., 351, 355 (2).
Kraus v. Thomas, 437, 440 (1).
Pennsylvania, etc., Sup. Co. v. Fosnotte, 166, 171 (6).
Winona, etc., R. Co. v. Rousseau, 248, 253 (8).
29. *Requisites.*—Briefs should be so prepared that all questions presented by the assignments of errors can be determined without examining the record.
Chicago, etc., R. Co. v. Newkirk, 349, 350 (2).
30. *Waiver.*—*Dismissal.*—Where appellant's brief fails to show how the issues in a case were decided, what the judgment was, what were the alleged errors, and separately-numbered points, and authorities to support them, no question is presented; and the appeal should be dismissed.
Chicago, etc., R. Co. v. Newkirk, 349 (1), 350 (1).
31. *Rules.*—Where appellants, in their brief, fail (1) to set out any errors relied upon, (2) to set out the motion for a new trial relied upon, or to state its grounds, (3) to set out the complaint or the substance thereof, (4) to set out the demurrer to the complaint, or to state the grounds thereof, and (5) to give a summary of the evidence, no question is presented.
Schrader v. Meyer, 36, 38 (3).
32. *Omissions.*—*Answer.*—*Demurrer.*—No question is presented, on appeal, as to the sufficiency of an answer to which a demurrer was sustained, where neither the answer nor the demurrer, or the substance of either, was set out in appellant's brief.
Leventhal v. Crampton, 92, 94 (2).
33. *Setting Out Evidence.*—A mere recital in appellant's brief of conclusions from the evidence presents no question thereon.
Dillon v. State, 495, 496 (2).

APPEAL—Continued.

34. *Mistake.—Railroads.—Negligence.*—Where the record shows that the plaintiff's complaint alleged that "owing to said negligence and reckless high rate of speed" the plaintiff sustained injuries, the appellant's contention that the averment "owing to said negligent and reckless high rate of speed," etc., shows but one act of negligence as the proximate cause of the injury, falls for lack of support. *Chicago, etc., R. Co. v. Coon*, 675, 680 (3).
35. *Failure to Set Out Motion for New Trial.*—Appellant's failure to set out, in his brief, his motion for a new trial, or the substance thereof, waives any question thereon.
Dillon v. State, 495, 496 (1).
Wah Kce v. Clark, 462, 464 (3).
36. *New Trial.—Waiver.*—Appellant's failure to set out his motion for a new trial in his brief, on appeal, constitutes a waiver of any question thereon, the court being under no duty to search the record for errors. *Leventhal v. Crampton*, 92, 95 (4).
37. *Failure to Set Out Questioned Pleadings or Evidence.*—A failure by appellants to set out in their brief the questioned pleadings, or the evidence, or its substance, constitutes a waiver of all questions thereon; and a mere reference to the place in the transcript where such pleadings, or evidence, may be found, is not sufficient. *Bradley v. Harter*, 541, 543 (1).
38. *Special Findings.—Evidence.—Failure to Set Out.—Presumptions.*—Where appellants' brief fails to set out the evidence, or the substance thereof, the presumption is that the special findings were supported thereby. *Bradley v. Harter*, 541, 545 (3).
39. *Omission of Special Findings.—Supply by Appellee.*—Questions on the special findings in a case will be considered, although such findings are not set out in appellant's brief, where appellee set them out in his brief. *Bradley v. Harter*, 541, 543 (2).

X. DISMISSAL.

40. An appeal from a judgment by agreement will be dismissed.
Maiben v. Manlove, 617, 622 (5).

XI. RULES.

41. *Courts.*—The Appellate Court rules are as binding as laws, and cannot be abrogated in a special case, at the discretion of the court. *Dillon v. State*, 495, 496 (3).
42. *Courts.*—The rules of the courts on appeal should be uniformly enforced. *Chicago, etc., R. Co. v. Newkirk*, 349, 350 (3).
43. The purpose of Appellate Court rules in relation to the preparation of briefs, is to enable the several judges to determine the merits of the appeal without the delay of examining the record. *Schrader v. Meyer*, 36, 37 (2).
44. *Matters in Bar.—How Shown.*—Matters in bar of an appeal may be presented without formal pleadings, by a verified motion to dismiss, and such motion may be resisted by counter-affidavits. *Maiben v. Manlove*, 617, 621 (2).

XII. REHEARING.

45. *New Points.*—Points not presented at the original hearing of a case on appeal cannot be presented on a petition for a rehearing. *Chicago, etc., R. Co. v. Coon*, 675, 689 (15).

APPEAL—Continued.

45a. *Jurisdiction.*—The question of want of jurisdiction can be raised at any time, even on petition for a rehearing.

Baltimore, etc., R. Co. v. New Albany Box, etc., Co., 647, 657 (8).

XIII. REVIEW.**(A) PRESUMPTIONS.**

46. On appeal the presumption is in favor of the action of the trial court. *Cincinnati, etc., Railroad v. Wall*, 605, 615 (16).

47. *Erroneous Rulings.—When Reversible.*—The presumption is that the rulings of the trial court were correct; but where erroneous rulings are affirmatively shown by the record, so material and influential as naturally to influence the result prejudicially to appellant, the judgment should be reversed, unless the appellee can show affirmatively from the record that such rulings were harmless.

Sherman v. Indianapolis Traction, etc., Co., 623, 630 (6).

48. *Consideration of Evidence.*—On appeal, it will be presumed that the trial court considered all the evidence admitted, the burden of showing otherwise being upon the party complaining thereof. *Hinshaw v. Security Trust Co.*, 351, 357 (8).

49. *Omission of Evidence.—Instructions.*—The presumption that a questioned instruction given, was supported by the evidence, where the evidence is not in the record, does not apply, where the instruction would be erroneous under any evidence within the issues.

Sherman v. Indianapolis Traction, etc., Co., 623, 630 (5), 631 (5).

(B) VERDICT AND FINDINGS.

50. *Considering Evidence.*—The Appellate Court will not weigh conflicting evidence; and in determining whether there is evidence to sustain the judgment below, only that most favorable to appellee will be considered.

Pennsylvania, etc., Sup. Co. v. Fosnotte, 166, 169 (4).

(C) HARMLESS ERROR.

51. Where an error is shown affirmatively to have been harmless, the judgment will not be disturbed.

Gregory v. Arms, 562, 578 (18), 581 (18).

52. *Defective Answer.*—The overruling of a demurrer to a defective paragraph of answer does not constitute harmful error, where the special findings show that the case was correctly decided on the merits.

McKnight v. Kingsley, 372, 378 (5).

53. *Admission of Improper Evidence.*—The admission of improper evidence over objection is harmless, where other uncontradicted evidence of the same character was introduced without objection.

Polk v. Haworth, 32, 36 (4).

54. *Rulings.*—Error in overruling a demurrer to a paragraph of answer is harmless, where no evidence was introduced in support of such answer. *Leonard v. City of Terre Haute*, 104, 115 (8).

(D) WAIVER OF ERROR.

55. *Failure to Point Out Error.*—Appellant's failure to point out how he was prejudiced by a ruling of the court constitutes a waiver of the alleged error. *Leventhal v. Crampton*, 92, 95 (6).

APPEAL—Continued.

XIV. DETERMINATION AND DISPOSITION OF CASE.

(A) AFFIRMANCE.

Evidence, not weighed on appeal, see NEGLIGENCE 17; *Winona, etc., R. Co. v. Rousseau*, 248, 259 (11).

Discretionary acts of trial court, reviewed only for abuse, see EVIDENCE 4; *Week v. Rawie*, 599, 602 (4).

56. *Weighing Evidence*.—The Appellate Court will not weigh conflicting evidence.

Humphrey v. Mottier, 469, 475 (6).

Lucas v. Rhodes, 211, 220 (6).

Meyer Bros. Coffee, etc., Co. v. Pauley, 412, 413 (1).

Oliver Typewriter Co. v. Vance, 21, 23 (3).

Poer v. Johnson, 596, 597 (1).

57. *Weighing Evidence*.—The jury trying a case is the sole judge of the weight of the evidence and of the credibility of the witnesses; and where there is some evidence tending to sustain every material allegation of the complaint, the judgment will not be disturbed, on appeal, for a want of evidence.

Brett v. Pretorius, 527, 531 (5).

Chicago, etc., R. Co. v. Coon, 675, 683 (7), 686 (7).

Hedrick v. Hedrick, 658, 660 (1).

Kerbaugh v. Nugent, 43, 55 (11).

58. *Right Result*.—Where the trial court reached a right result on the merits, its decision will not be disturbed.

Harrod v. Bisson, 549, 557 (4).

Kraus v. Thomas, 437, 441 (5).

59. *Weighing Evidence*.—*Right Result*.—The Appellate Court will not weigh conflicting evidence, and will affirm the judgment appealed from, where a right result was reached on the merits.

Perpetual Bldg., etc., Assn. v. Stiller, 418, 419 (3).

60. *Weighing Evidence*.—*Verdict*.—Where the evidence as to the facts is conflicting, the verdict is conclusive on appeal.

American Car, etc., Co. v. Smock, 359, 362 (2).

Chicago, etc., R. Co. v. Ginther, 12, 15 (3).

Ferdinand R. Co. v. Link, 1, 2 (2).

61. *Weighing Evidence*.—*Streets*.—*Defects*.—A verdict, upon conflicting evidence, that a street was defective, is conclusive on appeal.

City of Indianapolis v. Schoenig, 76, 80 (5).

62. *Weighing Evidence*.—*Principal and Agent*.—Where there is some evidence tending to show agency, a verdict founded thereon will not be disturbed on appeal.

Percu Heating Co. v. Lenhart, 319, 333 (10), 337 (10).

63. *Weighing Evidence*.—*Excessive Recovery*.—Where the evidence as to the value of services is conflicting the Appellate Court will not disturb the decision of the trial court.

Dearing v. Coulson, 414, 415 (1).

(B) FORM OF JUDGMENT.

64. *Presumptions*.—*Separate Verdicts on Joint and Several Complaint*.—In a joint and several action for tort, a defendant cannot successfully complain, on appeal, that a joint verdict should have been required, the presumption being, in such case, that the separate verdict was returned on the separate allegations against him.

Perley v. Schmidt Cut Stone Co., 344, 348 (4).

APPEAL—Continued.**(C) MANDATE.**

65. *Death*.—Where appellant dies before an affirmance of the judgment appealed from, it will be affirmed as of the date of submission.

Devin v. McCoy, 379, 383 (4).

Gubbins v. Harrington, 488, 491 (5).

Krouse v. Krouse, 3, 11 (8).

Norris v. Kendall, 304, 308 (5).

66. *Reversal*.—*New Trial*.—Though appellant is technically entitled to a judgment on the special findings, where the interests of justice require, a new trial will be ordered on a reversal.

Malon v. Scholler, 691, 695 (4).

67. *Answer*.—*Special Findings*.—*Conclusions of Law*.—Where the special findings show the same facts as are set out in an answer, the question of the sufficiency of the answer is unimportant, the exceptions to the conclusions of law raising the same questions.

Kerbaugh v. Nugent, 43, 46 (2).

"ASSESSMENTS"—

See WORDS AND PHRASES.

ASSIGNMENTS OF ERRORS—

See APPEAL.

ASSUMPSIT—

For goods delivered, see ACCOUNTS.

ASSUMPTION OF RISK—

See MASTER AND SERVANT.

ATTACHMENT—

Creditors.—*Filing Claims*.—*Statutes*.—Under §978 Burns 1908, §943 R. S. 1881, providing that "any creditor of the defendant, upon filing his affidavit and written undertaking, as hereinbefore required of the attaching creditor, may, at any time before the final judgment * * * make himself a party * * * and file his claim," the original plaintiff in an action in attachment may file, as a creditor, a claim omitted from his complaint; and striking out its ancillary complaint as a creditor constitutes prejudicial error, which is not cured by permitting the plaintiff to file additional paragraphs of its original complaint, since it cannot amend the affidavit upon which the attachment is based.

E. I. DuPont Co. v. Pennsylvania, etc., Coal Co., 538.

ATTORNEY AND CLIENT—

Authority of attorneys presumed, where they settled case, see APPEAL 20; *Maiben v. Manlove*, 617, 621 (3).

BANKS—

Deposits.—*Using for Payment of Note Payable at Bank*.—The deposit for collection of a note payable in bank authorizes such bank to apply the maker's general deposit in the payment thereof; and a failure to present the note at such bank for payment, when the maker has deposited money for its payment, relieves the maker of further interest or costs.

Kerbaugh v. Nugent, 43, 51 (7).

BILLS AND NOTES—

See ACCORD AND SATISFACTION.

Deposit of, authorizes bank to use maker's general deposit in payment thereof, see BANKS; *Kerbaugh v. Nugent*, 43, 51 (7).

Memoranda on, made by payee, not admissible in favor of payee, see EVIDENCE 6; *Hinshaw v. Security Trust Co.*, 351, 358 (10).

Filing of, as claims, see EXECUTORS AND ADMINISTRATORS 1; *Hinshaw v. Security Trust Co.*, 351, 354 (1).

Overdue for ten years, *prima facie* barred, see LIMITATION OF ACTIONS 1; *Hinshaw v. Security Trust Co.*, 351, 355 (3).

1. *Husband to Wife*.—A note executed by a husband to his wife is not void because of the relationship of the parties.

Krouse v. Krouse, 3, 8 (6).

2. *Duress*.—*Concealment of Husband's Clothing*.—*Attorneys*.—A wife who was living in separate apartments from her husband in San Francisco at the time of the San Francisco earthquake, and who concealed her husband's best suit and refused to disclose its whereabouts until he executed the note in suit, which represented, as she claimed, a part only of his upkeep, is not guilty of duress of goods, as a matter of law, on the ground that her husband was a lawyer and was under the dire necessity of presenting a neat appearance to hold his clients, especially where there is a failure of proof that he had any clients. *Krouse v. Krouse*, 3, 8 (7).

3. *Execution in Another State*.—*Presumptions as to Law Governing*.—*California*.—*Civil Law*.—Though the ordinary presumption is that a note executed in another state is governed by the common law as interpreted and applied in this State, such presumption does not obtain for the State of California, the court taking judicial notice that it constituted a part of Mexico, and was not originally settled by English people, and was therefore governed by the civil law, unless such law was superseded by subsequent constitutional or statutory enactment. *Krouse v. Krouse*, 3, 5 (3).

4. *Execution in California*.—*Presumption as to Governing Law*.—There being no presumption that the common law prevails in California, such state having been governed by the civil law, the courts of this State, in an action upon a note executed in that state, will determine the validity of the note by the laws of this State, where the laws of California have not been proved.

Krouse v. Krouse, 3, 8 (5).

5. *Mortgages*.—*Maturity*.—*Default of One Note of Series*.—*Penalties*.—A provision in a mortgage that the failure of the maker of a series of notes secured by the mortgage to pay each note at its maturity shall cause the remaining ones to become due, is not in the nature of a penalty, nor a forfeiture.

Kerbaugh v. Nugent, 43, 51 (5).

6. *Default*.—*Deposits in Bank*.—*Foreclosure for Entire Debt*.—*Tender*.—Where the maker of a series of notes had money on deposit with which to pay the one to become due, the payee's failure to present it, and his avoidance of the maker, in order that the provision in the mortgage might take effect, making the entire debt due upon default in the payment of any note at its maturity, will preclude his enforcement of such provision, the maker having made a tender in court of the sum due.

Kerbaugh v. Nugent, 43, 54 (9), 55 (9).

BILLS AND NOTES—Continued.

7. *Negotiability as Inland Bill.—How Determined.*—Whether a note is governed by the law merchant must be determined from the facts appearing upon the face thereof, unaided by intrinsic evidence. *Halstead v. Woods*, 127, 132 (3).
8. *Negotiability.—Essentials.*—A note is not negotiable as an inland bill of exchange unless, upon its face, there is an unconditional promise to pay a certain sum of money, at a fixed time, in a bank of this State. *Halstead v. Woods*, 127, 132 (4).
9. *Negotiability.—Payable "at" Bank.—Presumptions.*—A note dated at "Mount Ayr, Indiana," containing an unconditional promise to pay, at a certain time, a certain sum of money to the payee "at the bank of Mount Ayr," is governed by the law merchant, the presumption being that such bank is located at "Mount Ayr, Indiana," where the note was executed, the word "at" being used in the sense of "in." *Halstead v. Woods*, 127, 132 (5).
10. *Payable in Bank.—Payment by Deposits.—Agency.*—A note payable in bank is not discharged by the mere deposit in such bank of sufficient money to pay it, since the bank is not the holder's agent for receiving payment unless such holder has deposited such note in such bank for collection. *Kerbaugh v. Nugent*, 43, 50 (4).
11. *Payable in Bank.—Pleading and Proof.*—In an action on a note payable in bank, it is not necessary that the holder should plead and prove that the note was duly presented for payment at maturity, at such bank, but the maker may show that he was prepared to pay at such time and place, thereby avoiding any penalty for nonpayment. *Kerbaugh v. Nugent*, 43, 50 (3).
12. *Discharge.—Agency.—How Alleged.*—In a suit on notes and to foreclose a mortgage securing them, an answer that "the duly authorized agent of said plaintiff came to the defendants, and * * * agreed and contracted to take the machinery set out in the plaintiff's mortgage and his complaint herein, in full payment * * * of the debt herein sued on, and * * * that in compliance with said contract said defendants surrendered" such property to such agent, is insufficient, since it fails to show that such agent was authorized to make such a settlement. *Reeves & Co. v. Miller*, 339, 340 (1).
13. *Discharge.—Agency.—Ratification.—Allegations of.*—In a suit on notes and to foreclose a mortgage securing them, an answer alleging that plaintiff's duly authorized agent agreed to accept the property, for which the notes were given, in discharge thereof, and that the property was surrendered to and accepted by him, the answer further alleging that "the plaintiff has been in full and complete possession and control of said property ever since it was * * * surrendered as above set out," is bad on the theory of ratification, since it fails to show that the plaintiff knew of the conditions of such surrender and possession, the mortgage giving to plaintiff the right of possession in case of a default in payment. *Reeves & Co. v. Miller*, 339, 342 (2).
14. *Indorsements.—Evidence.*—Under §303 Burns 1908, §301 R. S. 1881, providing that "no acknowledgment or promise shall be evidence of a new or continuing contract * * * unless * * * contained in some writing signed by the party to be charged thereby," and §305 Burns 1908, §303 R. S. 1881, providing that "no indorsement * * * of any payment made upon any instrument of writing, by or on behalf of the party to whom the

BILLS AND NOTES—Continued.

payment shall purport to be made, shall be deemed sufficient to exempt the case from the provisions of this act," evidence of indorsements showing the payment of interest made by the payee of notes is not sufficient to take such notes out of the operation of the statute of limitations.

Hinshaw v. Security Trust Co., 351, 355 (4).

15. *Evidence.—Statute of Limitations.—Advancements.*—In a claim by the personal representative of the deceased payee of notes against the personal representative of the deceased maker thereof, upon such notes, the defenses being the statute of limitations and that the notes merely evidenced an advancement from the payee who was the maker's mother, uncontradicted evidence of the payment of interest thereon within ten years preceding the filing of the action thereon does not require a reversal of judgment for defendant, where there was evidence from which it could properly be found that such notes constituted an advancement.

Hinshaw v. Security Trust Co., 351, 357 (9).

16. *Defenses.—Duty of Court to Instruct as to Law.*—In an action upon a note, it is the duty of the court to instruct the jury as to the law concerning the defenses offered, and as to whether the note as it appears upon its face is governed by the law merchant.

Halstead v. Woods, 127, 131 (2).

17. *Place of Payment.—Instructions.—Assuming Facts.*—An instruction that the note in suit was payable at a bank in this State is correct, where the note was executed at "Mount Ayr, Indiana," and made payable "at the bank of Mount Ayr."

Halstead v. Woods, 127, 134 (6).

18. *Defenses.—Peremptory Instruction for Plaintiff.*—In an action on a negotiable note, an instruction that the plaintiff was entitled to recover unless the note was materially altered after its execution, is correct, where the plaintiff had testified to facts showing himself to be an innocent purchaser of such note for value, before maturity, and without notice of any defenses thereto, there being no testimony in conflict therewith.

Halstead v. Woods, 127, 134 (7).

BILLS OF EXCEPTIONS—

See APPEAL; EXCEPTIONS, BILLS OF.

BILLS OF PARTICULARS—

See WORK AND LABOR.

BOARDS OF COMMISSIONERS—

May not change final orders made by them, see JUDGMENT 3; *Furness v. Brummitt*, 442, 447 (5).

BONDS—

See CONTRACTS 7.

BRIEFS—

See APPEAL.

CARRIERS—

See TELEGRAPHS AND TELEPHONES.

1. *Passengers.—Standing in Car.*—Where a passenger is known to be standing in a car, regardless of the reason therefor, it is

CARRIERS—Continued.

the duty of the persons in charge of the car to operate it in such a manner as not to throw such passenger therefrom.

Winona, etc., R. Co. v. Rousseau, 248, 252 (4).

2. *Passengers.—Standing in Car.—Contributory Negligence.*—It does not constitute contributory negligence, as a matter of law, for a passenger to stand on a moving car.

Winona, etc., R. Co. v. Rousseau, 248, 252 (5).

3. *Care Toward Passengers.*—While it is not the customary duty of a motorman to look after the passengers on his car, it is his duty to exercise the highest practicable degree of care in the operation of his car; and this may require him to see whether passengers are in a position of safety.

Winona, etc., R. Co. v. Rousseau, 248, 252 (6), 258 (6).

4. *Passengers.—Sudden Start of Cars.—Complaint.—Inferences.*—Where a complaint shows the relation of passenger and carrier between plaintiff and defendant, the duties of the carrier need not be set out, since the law fixes them; and an allegation that the defendant violently started its car, thereby throwing the plaintiff therefrom, sufficiently states a cause of action.

Winona, etc., R. Co. v. Rousseau, 248, 250 (2), 252 (2).

5. *Passengers.—Sudden Start of Car.—Contributory Negligence.—Complaint.*—A complaint showing that the plaintiff was guilty of contributory negligence is bad on demurrer; but a complaint alleging that the plaintiff arose, preparatory to alighting from the car, and that the car started with a violent jerk, thereby throwing her therefrom, does not show contributory negligence.

Winona, etc., R. Co. v. Rousseau, 248, 252 (3).

6. *Stations.—Passengers.—Complaint.*—A complaint by a passenger of an interurban railway company, alleging that she arose in the car preparatory to alighting, that a signal to stop had been given, that the motorman negligently gave the car a sudden jerk, thereby throwing plaintiff from the car, but failing to allege that the place where she was attempting to alight was at a usual stopping place, is sufficient.

Winona, etc., R. Co. v. Rousseau, 248, 253 (9).

7. *Passengers.—Sudden Start of Car.—Signal by Stranger.—Proximate Cause.—Jury.*—In an action by a passenger against an interurban railway company for negligently and suddenly starting the car with a jerk, thereby throwing her therefrom, the alleged fact that a stranger gave the signal for the motorman to proceed, is not conclusive that the proximate cause of the injury received was the giving of such signal and not the alleged negligence in starting the car with a jerk, the question being for the jury; and an instruction that on proof of such alleged fact the plaintiff could not recover, was correctly refused.

Winona, etc., R. Co. v. Rousseau, 248, 255 (10), 259 (10), 260 (10).

8. *Negligence.—Damages.—Burden of Proof.*—The burden is on plaintiff to show that the injury received, or the pain suffered, was due in whole, or in part, to defendant's negligence; but where plaintiff was suffering from disease at the time of the injury, it is not necessary for him to show how much he would have suffered from the disease if he had not received the injury, such pain from sickness, or other cause, being matter in mitigation to be shown by defendant.

Sherman v. Indianapolis Traction, etc., Co., 623, 628 (3), 632 (3).

CARRIERS—Continued.

9. *Interurban Railroads.—Instructions.—Burden of Proof.—To "Satisfaction" of Jury.*—An instruction, in a personal injury case, that the burden is on the plaintiff to establish by a preponderance of the evidence to the "satisfaction" of the jury the material allegations of his complaint, should be refused; but the giving thereof does not constitute reversible error, where the other instructions clearly define what is meant by a preponderance of the evidence.

Sherman v. Indianapolis Traction, etc., Co., 623, 624 (1).

10. *Passengers.—Injuries.—Aggravating Sickness.—Instructions.*—In an action by a passenger for personal injuries, an instruction that if the plaintiff on the day he sustained the injury complained of contracted ptomaine poisoning, resulting in colitis and other ailments, and that his pain and suffering resulting therefrom was indistinguishably intermingled with the pain and suffering from the alleged injuries proximately caused by defendant interurban railroad company's negligence, he cannot recover from defendant, is bad under any state of the evidence on the question of negligence.

Sherman v. Indianapolis Traction, etc., Co., 623, 627 (2), 629 (2).

CASES—

For cases cited, see p. vi.

DISTINGUISHED:

Batman v. Snoddy, 132 Ind. 480, see *Humphrey v. Mottier*, 469, 473 (3).

Bunyan v. Reed, 34 Ind. App. 295, see *McKeon v. Ehringer*, 226, 232 (3).

Miller v. Dill, 149 Ind. 326, see *Harrod v. Bisson*, 549, 551 (1).

FOLLOWED:

Muren Coal, etc., Co. v. Copeland, 46 Ind. App. 230, see *Peabody, etc., Coal Co. v. Yandell*, 615, 616 (1).

OVERRULED:

McFadden v. Schroeder, 9 Ind. App. 49, see *Gregory v. Arms*, 562, 578 (17).

PARTLY OVERRULED:

Cleveland, etc., R. Co. v. Schneider, 40 Ind. App. 38, see *Harmon v. Foran*, 262, 270 (7).

Nichols v. Baltimore, etc., R. Co., 33 Ind. App. 229, see *Harmon v. Foran*, 262, 270 (7).

Pittsburgh, etc., R. Co. v. Reed, 36 Ind. App. 67, see *Harmon v. Foran*, 262, 270 (7).

Wamsley v. Cleveland, etc., R. Co., 41 Ind. App. 147, see *Harmon v. Foran*, 262, 270 (7).

CHAMPERTY AND MAINTENANCE—

Contracts.—Validity.—At the common law contracts for maintenance or champerty were void.

Lancaster Tp. v. Graves, 499, 501 (1).

CHANGE OF VENUE—

See VENUE.

CITIES—

See MUNICIPAL CORPORATIONS.

COAL MINES—

See MINES.

COLLATERAL ATTACK—

See JUDGMENT.

COMMERCE—

Contracts for interstate rates, void, if different from established rates, see **CONTRACTS 2**; *Baltimore, etc., R. Co. v. New Albany Box, etc., Co.*, 647, 655 (6), 657 (6).

1. *Interstate.—Contracts.—Shipping Goods.—Liability of Shipper.*—One who engages a railroad company to transport freight in interstate commerce is liable for the established rate on such freight, regardless of any contract such shipper might have with the consignee.

Baltimore, etc., R. Co. v. New Albany Box, etc., Co., 647, 651 (1).

2. *Interstate.—Rates.—Publication.—Conditions Precedent.*—The tariff of rates for interstate commerce is established when such rates are filed with and promulgated by the interstate commerce commission; and the posting of such schedules is not a condition precedent to the carrier's right to collect such rates.

Baltimore, etc., R. Co. v. New Albany Box, etc., Co., 647, 652 (2).

3. *Interstate.—Rates.—Mistake.—Action for Balance.*—Where, by mistake, a railroad company's agent quoted a wrong rate on an interstate shipment, and such incorrect rate was paid, the company's action on account for the balance due is of legal, and not of equitable, cognizance.

Baltimore, etc., R. Co. v. New Albany Box, etc., Co., 647, 653 (3).

4. *Interstate.—Rates.—Notice.*—A shipper must take notice of the rates for interstate shipments; and he relies, at his peril, on the statement of the carrier's agent.

Baltimore, etc., R. Co. v. New Albany Box, etc., Co., 647, 654 (4).

COMMON CARRIERS—

See CARRIERS.

COMPROMISE—

1. *Contracts of.—Contradicting.—Oral Evidence.*—The execution of a receipt in settlement of a negligence case, in form: "I, [plaintiff], in full accord and satisfaction of such disputed claim do hereby acknowledge the receipt of the sum of \$350 to me in hand paid by [defendant] * * * from any and all actions, causes of action, claims and demands, for, upon, or by reason of, any damage, loss, injury, or suffering which hereafter may be sustained by me * * * in consequence of such accident and injury," does not preclude the plaintiff from proving by oral evidence that an agreement to give him work was also a partial consideration for such release, the consideration stated being a recital.

American Car, etc., Co. v. Smock, 359, 360 (1), 371 (1).

2. *Election.—Discharge.—Estoppel.*—Where a defendant pleads in discharge of a liability a purported complete release which is asserted by the plaintiff to be only a partial release, the defendant is thereby estopped to question the release as it was actually made. Rabb, J., dissents.

American Car, etc., Co. v. Smock, 359, 363 (7).

CONCLUSIONS OF LAW—

See PLEADING; TRIAL.

CONSIDERATION—

See **CONTRACTS**; **FRAUDULENT CONVEYANCES**; **VENDOR AND PURCHASER**.

Forbearance to sue, see **SUBROGATION**.

CONSTITUTIONAL LAW—

Destruction of Property.—Use.—The legislature has no power to authorize such a use of property as virtually to deprive an adjoining owner of the legitimate and proper uses of his property.
Lake Shore, etc., R. Co. v. Chicago, etc., R. Co., 584, 593 (9).

“CONTINGENCIES”—

See **WORDS AND PHRASES**.

CONTRACTS.

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|---------------------------------------|-----------------------------------|
| I. REQUISITES AND VALIDITY, 1-6. | III. RESCISSION, 14. |
| II. CONSTRUCTION AND OPERATION, 7-13. | IV. PERFORMANCE OR BREACH, 15-17. |
| | V. ACTIONS FOR BREACH, 18-28. |

See **CHAMPERTY AND MAINTENANCE**; **INSURANCE**; **LIMITATION OF ACTIONS**; **PRINCIPAL AND AGENT**; **REFORMATION**; **SALES**; **SPECIFIC PERFORMANCE**; **TORTS**; **VENDOR AND PURCHASER**; **WORK AND LABOR**.

I. REQUISITES AND VALIDITY.

Freight rates established by the interstate commerce commission cannot be changed by, see **COMMERCE** 1-4; *Baltimore, etc., R. Co. v. New Albany Box, etc., Co.*, 647.

For sale of real estate, see **FRAUDS**, **STATUTE OF**.

For keeping horse, see **LIVERY STABLE KEEPERS**.

Acceptance of benefits of, requires performance of burdens of, see **MASTER AND SERVANT** 5; *Illinois Central R. Co. v. Fairchild*, 300, 304 (3).

Forbearance to sue, as a consideration, see **SUBROGATION** 4; *Gregory v. Arms*, 562, 574 (13), 577 (13).

Express mention of remedies, effect, see **VENDOR AND PURCHASER** 12; *Straus v. Yeager*, 448, 458 (10), 460, (10), 461 (10).

1. *Consideration.—Value of.*—Where parties agreed to a consideration of indeterminate value for their contract, the courts will uphold the contract. *Gregory v. Arms*, 562, 575 (15).

2. *Interstate Freight Rates.*—Parties have no power to fix the rates on interstate shipments; and contracts therefor are void. *Baltimore, etc., R. Co. v. New Albany Box, etc., Co.*, 647, 655 (6), 657 (6).

3. *Consideration.—Use of Property.*—In an action for the use of an engine, boiler, and drilling machinery, one paragraph of the complaint alleging an agreement by defendant to pay a reasonable compensation for the use of such property, the court finding that defendant had the possession and use thereof for forty-seven days, a sufficient consideration to support the contract is shown.

Independent Torpedo Co. v. J. E. Clark Oil Co., 124, 126 (2).

4. *Payment of Costs of Litigation for Part of Amount Recovered.—Townships.*—A contract between a township and an auditing company, whereby the latter agreed to investigate the accounts of a former trustee of such township and, if necessary, to liti-

CONTRACTS—Continued.

2. *Force and Effect of Contract.*—A contract is binding on the parties thereto, and the law will enforce its performance, unless it is illegal, immoral, or against public policy.
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5. *Force and Effect of Contract.*—A contract is binding on the parties thereto, and the law will enforce its performance, unless it is illegal, immoral, or against public policy.

II. CONSTRUCTION AND OPERATION.

7. *Words.—Tentative.*—A contract by an attorney-at-law, and the deed given to secure the performance thereof, executed to a township for the purpose of investigating the official acts of a former trustee and to recover any money found due to the township, must be construed together as constituting one contract.
Lancaster Tp. v. Granger, 439, 503 (3).
8. *Entire.—Divisible.*—A contract is not necessarily indivisible because it is contained in one instrument and signed by the same parties.
Straus v. Yeager, 448, 454 (1).
9. *Exclusion of Legal Remedy.*—A contract that excludes a legal remedy for the breach thereof must be definite and positive in that regard.
Straus v. Yeager, 448, 461 (12).
10. *Words.*—Contracts will be construed so as to give effect to the intention of the parties; and the words used will be given their ordinary meaning unless a different meaning is indicated.
Straus v. Yeager, 448, 461 (13).
11. *Consistency.—Application of Law Thereto.*—In construing a contract, the instrument should be made consistent; and the law applicable thereto should be considered in making such construction.
Straus v. Yeager, 448, 461 (14).
12. *Waiver.—Custom.*—Custom cannot control a contract in direct conflict therewith.
Shedd v. American Credit, etc., Co., 23, 30 (6).
13. *Use of Property.—Custom.*—In an action for the use of property for the repair of an oil well after "shooting," the custom of furnishing such property free before "shooting" has no application.
Independent Torpedo Co. v. J. E. Clark Oil Co., 124, 126 (4).

III. RESCISSION.

14. *Avoidance.—Election.*—Where a person has an option to avoid a contract, his election to avoid must embrace the entire contract, and he cannot avoid the objectionable parts and affirm the favorable ones.
American Car, etc., Co. v. Smock, 359, 362 (3).

IV. PERFORMANCE OR BREACH.

15. *Illegal.—Estoppel.—Interstate Commerce.—Rates.*—An interstate carrier is not estopped from recovering the balance due for a shipment by the unauthorized act of its agent in quoting an illegal freight rate.
Baltimore, etc., R. Co. v. New Albany Box, etc., Co., 647, 654 (5).

CONTRACTS—Continued.

16. *Breach.—Damages.—Anticipation of.*—A party who violates his contract is liable for such damages as proximately flow therefrom, if such damages could reasonably have been anticipated.
Crouch v. Lewis, 465, 469 (9).
17. *Releases.—Consideration.—Contradicting.—Railroads.—Negligence.*—A recital in an alleged release of a claim against a railroad company, that the consideration for such release was the sum of \$250, may be contradicted by proof of the true consideration.
Illinois Cent. R. Co. v. Fairchild, 300, 301 (1).

V. ACTIONS FOR BREACH.

Varying written receipt by oral evidence, see COMPROMISE 1; *American Car, etc., Co. v. Smock*, 359, 360 (1), 371 (1).

Jurisdiction in, see COURTS.

18. *Oral Modifications.—Commissions for Sales of Real Estate.—Statute of Frauds.—Complaint.*—A complaint alleging that defendants entered into a written contract with the plaintiff to pay to him a certain commission provided he effected a sale of their land for \$5,000, that afterwards such contract was orally modified to provide for the payment of such commission upon a sale of such land for \$4,500, and that the plaintiff so effected a sale at \$4,500, does not state a cause of action, §7463 Burns 1908, Acts 1901 p. 104, §1, requiring all contracts for such commission to be "in writing;" and such provisions cannot be varied or waived by parol.
Wellington v. Crawford, 173, 174 (1), 177 (1).
19. *Vendor and Purchaser.—Options.—Breach.—Complaint.*—Where a landowner gave an option on his land, agreeing in case of actual sale thereof for a certain sum, to give the holder of such option a certain commission, and before the expiration of such option sold such land to another, the holder of such option may maintain an action for damages for the breach thereof; but a complaint therefor must be based upon such breach and not for commissions earned by reason of such sale.
Wellington v. Crawford, 173, 177 (2).
20. *Performance.—Complaint.*—A complaint for the breach of a contract must allege that the plaintiff has performed all the conditions thereof on his part, or show an excuse for his failure so to perform.
Crouch v. Lewis, 465, 467 (5).
21. *Sales of Animals.—Breach.—Market Price.—Complaint.*—A complaint for the breach of a contract for the purchase of hogs, alleging that the plaintiff, upon defendant's refusal to accept the hogs, shipped them to the Union Stockyards at Indianapolis and sold them at a certain price, being the best price he could obtain, sufficiently shows that he sold them at the market price.
Rigley v. Mooney, 16 Ind. App. 362, distinguished.
Wallace v. Coons, 511, 516 (3).
22. *Discharge.—Action.—Answer.—Reply.—Corporations.*—In an action upon a contract presumably executed by a corporation in discharge of an alleged liability, such corporation may answer a want of authority on the part of the alleged agent who executed the contract, and, in such event, the plaintiff, if he succeeds, is required to reply the facts showing such agent's authority.
American Car, etc., Co. v. Smock, 359, 371 (8).
23. *Breach.—Answer.—Counterclaim.—Issues.*—Sustaining a motion to strike from a counterclaim an allegation that defendant had performed all the conditions of said contract on his part is

CONTRACTS—Continued.

erroneous, though harmless, where a paragraph of answer contained such allegation, and where the counterclaim was held sufficient on demurrer, the presumption being, where the evidence is not in the record, that evidence of such performance was not introduced, as, under the issues, it might have been.

Crouch v. Lewis, 465, 467 (6).

24. *Sales.—Breach.—Notice.*—In an action for the breach of an executory contract to purchase hogs, it is not necessary for the plaintiff, after the vendee's refusal to accept the hogs, to prove that he gave such vendee notice of the sale of the hogs, since the title remained in the vendor, and the action was merely for the breach of contract.

Wallace v. Coons, 511, 517 (5).

25. *Varying by Proof of Custom.*—In an action for the agreed reasonable price of property furnished for use in repairing an oil well, proof of a custom of furnishing the free use of such property is inadmissible.

Independent Torpedo Co. v. J. E. Clark Oil Co., 124, 127 (5).

26. *Sales.—Breach.—Special Findings.*—In an action for the breach of an executory contract to purchase a certain number of hogs, special findings that defendant refused to accept the hogs, that the plaintiff sold them and that his loss thereon in consequence of such refusal was a certain sum, requires a judgment for the plaintiff in such amount.

Wallace v. Coons, 511, 518 (6).

27. *Liquidated Damages.—Penalties.—Directing Verdict.*—A provision in a contract for the sale of a threshing outfit that "in consideration of the expense incurred by the company in soliciting, investigating and taking this order, the purchaser promises and agrees to pay * * * fifteen per cent of the price * * * in case he should cancel the order or decline to accept the machinery," constitutes a penalty, and is invalid, where the expenses incurred consisted merely in taking defendant's order and in mailing some letters asking as to defendant's responsibility, the expenses being confined solely to those mentioned in the contract; and, in an action for such per cent, a verdict was properly directed for defendant.

J. I. Case, etc., Mach. Co. v. Souders, 503, 507 (2).

28. *"Use" of Property.*—In an action by plaintiff for the use of its property by defendant, a judgment for the "use" thereof for the time defendant had the possession thereof was proper, though defendant did not actually use the property during the whole of such time.

Independent Torpedo Co. v. J. E. Clark Oil Co., 124, 126 (3).

CONTRIBUTORY NEGLIGENCE—

See NEGLIGENCE; MASTER AND SERVANT.

No defense to an action for a nuisance, see NUISANCE 4; *Niagara Oil Co. v. Jackson*, 238, 244 (5).

CORPORATIONS—

See TORTS.

Answer of agent's want of authority by, see CONTRACTS 22.

Pollution of streams by, see WATERS.

1. *Wrongful Transfer of Stock.—Remedies.*—The owner of stock wrongfully transferred upon the books of a corporation may elect to sue in equity or at law.

Vernon, etc., R. Co. v. Washington Tp., 309, 314 (3).

CORPORATIONS—Continued.

2. *Stock.—Wrongful Transfers.—Townships.—Railroads.*—A township whose stock in a railroad company was unlawfully sold, reissued and transferred to another, on the books of the company, may, in an equitable proceeding, compel such company to cancel such stock and reissue the stock to such township.
Vernon, etc., R. Co. v. Washington Tp., 309, 314 (4), 316 (4).
3. *Wrongful Transfer of Stock.—Reissuing.—Complaint.*—A complaint by a township to compel a railroad company to cancel stock issued to one to whom the township trustee had unlawfully assigned it, and to compel the company to reissue the stock to the township, does not need to contain a prayer for alternative relief in damages in case the court should refuse to order the stock canceled and reissued.
Vernon, etc., R. Co. v. Washington Tp., 309, 318 (6).
4. *Wrongful Transfer of Stock.—Reissuing.—Complaint.—Value.*—A complaint to compel a corporation to cancel stock unlawfully held by another and to compel the reissuance of such stock to the owner, alleging the par value thereof, but failing to allege the real value, is sufficient, the *prima facie* presumption being that the par value constitutes the real value.
Vernon, etc., R. Co. v. Washington Tp., 309, 318 (7).
5. *Public Service.—Heating Companies.—Duties.*—It is the duty of a heating company, furnishing heat to the occupants of a building, to use care commensurate with dangers to be apprehended from the furnishing of such heat.
Peru Heating Co. v. Lenhart, 319, 328 (4).
6. *Heating Companies.—Natural Laws.—Notice.*—Heating companies are conclusively presumed to know of the natural laws of freezing, of the climate, and of the injurious results liable to flow from the bursting of pipes.
Peru Heating Co. v. Lenhart, 319, 329 (7).
7. *Heating Companies.—Negligence.—Interrogatories.*—In an action against a heating company and the owner of a rented building for negligence in disconnecting the hot-water heat therefrom, where the interrogatories show that the owner's servant was instructed by the heating company how to disconnect such heat, but where there is nothing in such interrogatories and answers thereto that can negative certain facts, provable under the issues, and which may be assumed as proved in favor of the general verdict, such answers do not overthrow a general verdict against such company.
Peru Heating Co. v. Lenhart, 319, 330 (8).

COUNTERCLAIM—

See SET-OFF AND COUNTERCLAIM.

COURTS—

See JUSTICES OF THE PEACE.

As to rules of, see APPEAL.

Opinion of trial court cannot be considered on appeal, see APPEAL 13; *Hinshaw v. Security Trust Co.*, 351, 356 (6).

Transfers from Appellate to Supreme, see APPEAL 3; *Bennett v. Evansville, etc., R. Co.*, 147, 150 (3).

1. *Supreme.—Appellate.*—The Appellate Court is bound by the rules of law announced by the Supreme Court.
Shutt v. Smith, 160, 161 (2).
State Life Ins. Co. v. Jones, 186, 188 (2).

COURTS—Continued.

2. *Federal.—State.—Superiority.*—The decisions of the federal Supreme Court are binding upon state courts.

Bennett v. Evansville, etc., R. Co., 147, 150 (2).

3. *Jurisdiction.—Interstate Commerce.—Rates.*—The state courts have jurisdiction of actions by carriers for the recovery of the balance due from shippers engaged in interstate commerce.

Baltimore, etc., R. Co. v. New Albany Box, etc., Co., 647, 657 (7).

4. *Jurisdiction.—Contracts.—Sales.*—The circuit court of the county in which defendant lives has jurisdiction of an action to recover damages for an alleged breach of an executory contract for the sale of lands situate in Illinois.

Straus v. Yeager, 448, 453 (1).

COVENANTS—

See LANDLORD AND TENANT; VENDOR AND PURCHASER.

To build certain kind of fence along railroad right of way, can be enforced, see INJUNCTION 2-10; *Cincinnati, etc., Railroad v. Wall*, 605.

CROPS—

See LIFE ESTATES.

CUSTOM—

Cannot control a contract in conflict therewith, see CONTRACTS 12, 13.

Cannot control the express provisions of a contract, see INSURANCE 12; *Shedd v. American Credit, etc., Co.*, 23, 29 (5), 30 (5). 605.

DAMAGES—

See CONTRACTS; EMINENT DOMAIN; MASTER AND SERVANT; NUISANCE; RAILROADS; TORTS; WATERS.

Abatement of action for, see ABATEMENT.

Contracts may fix, see CONTRACTS 6; *J. I. Case, etc., Mach. Co. v. Souders*, 503, 505 (1).

Excessive, ground for a new trial, see NEW TRIAL 8.

Instruction as to evidence to be considered in determining, see TRIAL 13; *Mesker v. Leonard*, 642, 644 (2).

1. *Deformities.—Worry.—Negligence.*—Personal disfigurement, resulting from negligent injury, and also "anxiety and distress of mind" reasonably caused by the injury complained of, constitute proper elements of damage. *Harrod v. Bisson*, 549, 560 (7).

2. *Injured Wrist.—Worry.*—In an action for negligent injuries to plaintiff's wrist, she is entitled to damages for any pain, suffering, worry, or anxiety experienced in the actual use of such wrist and which is the direct result of the maimed condition thereof. *Harrod v. Bisson*, 549, 561 (8).

3. *Negligence.*—The damages recoverable in a negligence case are those which flow proximately from the negligence alleged.

City of Indianapolis v. Slider, 38, 42 (4), 43 (4).

4. *Sine Injuria.—Use of Property.—Legislative Sanction.*—One using his property under legislative sanction, in a reasonable and proper way, without malice or negligence, is not liable for incidental damages to others, such injuries being regarded as "damnum absque injuria"; and the fact that the plaintiff was

DAMAGES—Continued.

established in the use of his property before defendant located and established its business does not affect the question.

Lake Shore, etc., R. Co. v. Chicago, etc., R. Co., 584, 590 (7).

5. *Excessive.—Interurban Railroads.*—Where a verdict is not so large as to indicate that the jury acted from prejudice, partiality or corruption, it will not be disturbed on appeal.

Winona, etc., R. Co. v. Rousseau, 248, 253 (7).

DEATH—

See ABATEMENT; ACTION; APPEAL 6, 7.

Mandate in case of, see APPEAL 65.

Beneficiaries of, in railroad cases, must be alleged, see RAILROADS 13.

DECEDENTS' ESTATES—

See DESCENT AND DISTRIBUTION.

Competency of witnesses to testify in cases involving, see WITNESSES.

DEEDS—

See EASEMENTS; FRAUDULENT CONVEYANCES; REFORMATION; VENDOR AND PURCHASER; WILLS.

1. *Grantors.—“Unsound Mind.”—Statutes.*—The words “unsound mind,” as used in §3938 Burns 1908, §2917 R. S. 1881, providing that “persons of unsound mind and infants may not alien lands,” import such a want of mental capacity as, measured by the standard fixed by the courts, incapacitates a person from executing a deed.
Humphrey v. Mottier, 469, 473 (2).

2. *Wills.—Estates.—Life.—Fee.—Words of Inheritance.—“Heirs.”—“Heirs of the Body.”*—Where an estate is limited to a person for life and by the same instrument the remainder is limited, either mediately or immediately, to his “heirs,” or the “heirs of his body,” the first taker takes a fee simple, or a fee tail, “heirs,” or “heirs of the body,” being words of limitation and not of purchase.
Snyder v. Greendale Land Co., 178, 183 (1).

3. *Wills.—Estates.—Life.—Fee Simple.*—Deeds granting certain land to each of the grantor's daughters “for and during the term of her natural life, and upon her demise to the children of said [daughter] and their descendants who may be alive at the time of the death of said [daughter], their heirs and assigns forever,” when construed with a will making such deeds a part thereof by reference and confirming them, giving such land to each of such daughters and her “descendants,” if any of such daughters are dead, and with a memorandum reciting the conveyance of such lands to each of such daughters “for life, with remainder to (her) children,” the devise of a life estate to testator's wife of all lands not conveyed to such daughters and their “descendants,” and the devise of the residue of testator's property to such daughters, the children of any one deceased to receive her part, gives to each daughter a life estate in such lands, remainder in fee simple to her children living and the descendants of those that are dead at the time of such daughter's death, such estate vesting at the death of the testator and the acceptance of the deed.
Snyder v. Greendale Land Co., 178, 183 (3), 185 (3).

DEMAND—

Where useless, unnecessary, see SPECIFIC PERFORMANCE 4; *Timmonds v. Taylor*, 531, 536 (4).

DEMURDER—

See PLEADING.

DEPOSITIONS—

See EVIDENCE.

1. *Evidence.—Rebuttal Testimony.—Objections.*—An objection to certain parts of a deposition on the ground that they were admissible only in rebuttal is not well taken, where they are at all admissible under the issues, either directly, or in rebuttal of testimony which might be admitted. *Week v. Rawie*, 599, 601 (1).
2. *Evidence.—Patent Facts.—Objections.—When Made.*—Where grounds of objection are disclosed on the face of depositions, objections made at the trial are too late. *Week v. Rawie*, 599, 601 (2).

“DESCENDANTS”—

See WORDS AND PHRASES.

DESCENT AND DISTRIBUTION—

Of crops, see ADVANCEMENTS; LIFE ESTATES.

Descent of easements, see EASEMENTS 9, 10; *Lucas v. Rhodes*, 211.

Of growing crops, see LANDLORD AND TENANT 2; *Vawter v. Frame*, 481, 483 (1).

Adopted Children.—Husband and Wife.—Under §3027 Burns 1908, §2489 R. S. 1881, providing that “if a * * * wife die intestate, leaving no child, but leaving a father and mother, or either of them, * * * her property * * * shall descend three-fourths to the * * * widower, and one-fourth to the father and mother jointly, or to the survivor of them,” and §870 Burns 1908, Acts 1883 p. 61, providing that an adopted child shall “be entitled to and receive all the rights and interest in the estate of such adopting father or mother * * * that such child would if the natural heir of such adopting father or mother: Provided, however, that should such adopted child die intestate, without leaving a wife or husband, issue or their descendants * * * seized of any * * * property which may have come to such child by gift, devise or descent from such adopting father or mother, such property * * * shall * * * descend to the heirs of said adopting father or mother,” and §871 Burns 1908, §826 R. S. 1881, providing that an adopted child “shall occupy the same position” as a natural child, the property of an adopted daughter, leaving a natural father and mother, an adopting father, a husband, but no children, descends three-fourths to the husband, and one-fourth to the adopting father; and the fact that the form of the property inherited from the adopting mother had been changed, does not change the descent. *Dunn v. Means*, 383, 388 (2).

DISAFFIRMANCE—

See CONTRACTS.

DISMISSAL—

Of appeal, see APPEAL.

DRAINS—

As affected by railroads, see RAILROADS.

1. *Void Order Establishing.—Injunction.—Estoppel.—Jurisdiction.*—One who obtains a decree enjoining the construction of a drain established under an order alleged to be void for want of jurisdiction, is estopped to assert in another suit that the board had jurisdiction in making such void order and that therefore the board's jurisdiction was lost in such proceeding.
Furness v. Brummitt, 442, 444 (1).
2. *Void Orders.—Jurisdiction.*—An order for the construction of a drain, made at a void special session, does not affect the board's jurisdiction to proceed with the drainage case at a later regular session.
Furness v. Brummitt, 442, 445 (2), 446 (2), 447 (2).
3. *Erroneous Judgment.—Remedy.—Appeal.*—The remedy for an erroneous order made by the board of commissioners in a drainage case is by appeal.
Furness v. Brummitt, 442, 445 (3).
4. *Injunction.—Parties.*—Where a drain has been established and a commissioner appointed to construct it, a suit to restrain the construction thereof must be against such commissioner, and not against the petitioners.
Furness v. Brummitt, 442, 447 (6).
5. *Repairs.—Notice.—Jurisdiction.*—Under §5631 Burns 1905, Acts 1905 p. 456, §104, providing that the repairs on drains "shall be let as a whole or by sections, as the surveyor may deem for the best interests of the parties * * * after notice first given for ten days by posting," such surveyor's jurisdiction to proceed is restricted to the method prescribed; and his action in letting such contract and in repairing the drain without the giving of such notice is void.
Brett v. Pretorious, 527, 529 (1).
6. *Repairs.—Assessments.—Notice.—Complaint.*—A complaint alleging that the county surveyor, without notice, and without bids, let a contract for the repair of a drain extending through plaintiff's land, that he made an assessment for the expenses thereof and placed such assessment on the tax duplicates against plaintiff's property, and praying that such assessment be canceled and declared void, is sufficient.
Brett v. Pretorious, 527, 530 (2).
7. *Repairs.—Jurisdiction.—Injunction.—Appeal.*—Where a drain is repaired without giving the affected landowners any notice thereof, and without receiving any bids for the making of such repairs, the remedy is by injunction and not by appeal.
Brett v. Pretorious, 527, 530 (3).

DURESS—

Of goods, see BILLS AND NOTES 2; *Krouse v. Krouse*, 3, 8 (7).

EASEMENTS—

See EMINENT DOMAIN.

Suit to confirm, new trial demandable, see NEW TRIAL 15.

1. *Rights of Way.—Implied Grants of.—Complaint.*—A complaint alleging that plaintiff's joint grantors conveyed to him a tract of land having no outlet except over their retained land, and that subsequently they conveyed such retained land to defendants, shows that the plaintiff's deed carried with it an implied grant of a way as of necessity over defendant's land.
Thomas v. McCoy, 403, 404 (2).
2. *Servient Estates.—Subsequent Grantees.*—Subsequent grantees of land burdened with an easement take such land subject thereto.
Thomas v. McCoy, 403, 405 (3).

EASEMENTS—Continued.

3. *Character of Estate.—Extinguishment.*—A right of way over land constitutes an interest therein; and such interest, whether acquired by adverse use, or by express or implied grant, can be extinguished only in a mode recognized by law.
Thomas v. McCoy, 403, 405 (4).
4. *Rights of Way.—Creation of.—Presumptions.*—A way is an incorporeal hereditament and consists in a right to pass over the land of another; and it may arise from grant, prescription or necessity, and is either in gross—attached to, and dying with, the person using it—or appurtenant—annexed to and passing with a conveyance of the land—the disputable presumption being that it is appurtenant.
Lucas v. Rhodes, 211, 217 (1).
5. *Rights of Way.—Appurtenant.—Evidence.*—Evidence that the former owner of plaintiff's land had access over his own land to a highway on the east side thereof, that he owned another farm lying southwest from the plaintiff's farm, and separated therefrom by another farm over which he passed to reach the latter farm, and that such route was much nearer than any other, justifies a finding that any easement acquired therein by prescription was appurtenant and not in gross.
Lucas v. Rhodes, 211, 218 (2).
6. *Prescription.—Elements.*—To create an easement by prescription in a right of way the use of the way must be adverse, under a claim of right, exclusive, continuous, uninterrupted and with the owner's knowledge and acquiescence.
Lucas v. Rhodes, 211, 219 (3).
7. *Rights of Way.—Permissive Use.—Presumptions.*—The fact that an owner himself used a way left open across his farm, that an adjoining proprietor also used it, by virtue of an agreement that he should assist in keeping it in repair and in maintaining gates along the way, raises a disputable presumption that the adjoining proprietor's use was permissive.
Lucas v. Rhodes, 211, 219 (4).
8. *Prescription.—Question for Jury.*—Whether a right of way was obtained by prescription is ordinarily a question of fact for the jury.
Lucas v. Rhodes, 211, 220 (5).
9. *Prescription.—Descent.*—Easements appurtenant in a right of way pass with the land to the owner's heirs.
Lucas v. Rhodes, 211, 222 (11).
10. *Descent.—Partition.—Deeds.*—Easements appurtenant pass by descent with the land; and where quitclaim deeds are made by the heirs in partitioning such land, the heirs hold title by descent and not by virtue of such deeds. *Lucas v. Rhodes*, 211, 223 (12).
11. *Omissions.—Partition.—Deeds.*—Where two heirs make quitclaim deeds dividing their father's land, the fact that they mention certain easements therein, but fail to mention an alleged easement over a neighbor's land, does not import the exclusion of the latter easement; but such easement passed as appurtenant to the inherited land.
Lucas v. Rhodes, 211, 224 (13).

ELECTION—

See INJUNCTION 8; INSURANCE

Must apply to entire contract, see CONTRACTS 14; *American Car, etc., Co. v. Smock*, 359, 362 (3).

ELECTION—Continued.

Inconsistent Positions.—Where a person has a right of election between inconsistent positions, he will be restricted to that first chosen. *American Car, etc., Co. v. Smock*, 359, 363 (6).

EJECTMENT—

See NEW TRIAL; QUIETING TITLE.

ELECTRICITY—

See TELEGRAPHS AND TELEPHONES.

Judicial notice of dangers of, see EVIDENCE.

Complaint to prevent use of, by interurban railroad company, see INJUNCTION 1.

Use of.—Care Required.—Electricity is highly dangerous, and persons making use thereof are required to use care commensurate with the dangers thereof.

Cumberland Tel., etc., Co. v. Kranz, 67, 74 (6).

EMINENT DOMAIN—

See RAILROADS.

1. *Railroads.—Rights of Way.—Damages.—Evidence.*—A judgment for \$350 is not excessive for the appropriation of a railroad right of way running diagonally through an eighty-acre tract of land, taking two and eight-tenths acres therefrom and leaving a triangular tract of from eight to eleven acres on one side of the right of way, the grade of the road being two feet above the surface of the land and there being no place left for the drainage of such triangular tract, such land being valued at from thirty to sixty-five dollars an acre.

Ferdinand R. Co. v. Link, 1, 2 (1).

2. *Railroads.—Damages.—Life Estates.—Remainders.—Instructions.*—In condemning land for a railroad right of way, both the owner of the life estate and the owner of the remainder in fee simple are entitled to damages; and an instruction in an action by the owner of the life estate, that she was not entitled to recover, was properly refused.

Polk v. Haworth, 32, 36 (3).

3. *Railroads.—Damages.—Instructions.*—In an action for the appropriation by a railroad company of a tract of land including a house, an instruction that "evidence has been permitted * * * as to the value of the walls and foundation of the building * * * and the value of other separate parts of said building, and also of a well on the land," and that "the real question * * * is the fair market value of the improvements taken as a whole, and as they existed on the real estate appropriated" on the day of the filing of the instrument of appropriation, is not prejudicial, where the case was tried, and evidence admitted, on the theory that the damage should cover the depreciation in value of the land and improvements, and where another instruction was given stating that "the measure of damages is the difference in the value of the real estate at the time of the appropriation, and the value of the residue after the strip is taken under the appropriation proceedings," and that "the words 'real estate' include both the land and the improvements thereon."

Halstead v. Vandalia R. Co., 96, 98 (2).

4. *Damages.—Instruction.*—"Should" Consider Evidence.—In an eminent domain proceeding, an instruction that the jury "should" consider the evidence of the amount paid by the defendant for the real estate in question, along with all the other evidence in

EMINENT DOMAIN—Continued.

the case, in determining the damages, is not erroneous, since it is the duty of the jury to consider all the evidence and give each particular part thereof the weight it deserves.

Halstead v. Vandalia R. Co., 96, 99 (3).

5. *Damages.—Specific Future Use.*—In an eminent domain case, an instruction that opinions of witnesses as to the damages sustained, based upon the value of the property to the defendants for an intended specific future use "should be disregarded so far as [they are] so based upon the value for an intended specific future use," is correct. *Halstead v. Vandalia R. Co.*, 96, 100 (4).

6. *Evidence.—Appraisers' Report.—Instruction Curing Erroneous Admission of.*—In an eminent domain proceeding, an appeal to the circuit court compels a trial of the case *de novo*, and the admission of evidence showing the amount of the assessment of damages by the appraisers is erroneous, but an instruction that the cause is on trial *de novo* regardless of such appraisalment, that the jury has nothing to do with such appraisalment, and that "It is not even evidence of any character * * * and [the jury] should not consider it at all," cures such error, especially where the evidence shows that substantial justice has been done.

Halstead v. Vandalia R. Co., 96, 100 (5).

EMPLOYERS' LIABILITY ACT—

See MASTER AND SERVANT.

EQUITY—

See MORTGAGES; MUNICIPAL CORPORATIONS; REFORMATION; SUBROGATION; TRUSTS.

ESTATES—

See DEEDS; DESCENT AND DISTRIBUTION; EASEMENTS; LIFE ESTATES. For life, condemnation of, see EMINENT DOMAIN.

ESTOPPEL—

Judgment by agreement creates, see APPEAL 21; *Maiben v. Manlove*, 617, 621 (4).

No estoppel from questioning illegal interstate freight rates, see CONTRACTS 15.

To assert contradictory positions as to validity of court order, see DRAINS 1; *Furness v. Brummitt*, 442, 444 (1).

By accepting benefits of contract, see MASTER AND SERVANT 5; *Illinois Cent. R. Co. v. Fairchild*, 300, 304 (3).

Standing by, while street improvements are made, see MUNICIPAL CORPORATIONS 24, 26; *Brownell Improv. Co. v. Nixon*, 195.

EVIDENCE.

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|-------------------------------|----------------------------------|
| I. JUDICIAL NOTICE, 1-3. | III. DOCUMENTARY EVIDENCE, 5, 6. |
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See DEPOSITIONS.

Burden of proof, see CARRIERS 8, 9.

Burden of proof to show relationship of master and servant, see MASTER AND SERVANT 13.

Burden of proving contributory negligence, on defendant, see NEGLIGENCE 13, 15, 16.

EVIDENCE—Continued.

- Burden of proof in actions for labor, see **WORK AND LABOR**.
- Failure to object to evidence of an accord and satisfaction, not pleaded, constitutes a waiver of any error, see **ACCORD AND SATISFACTION**; *Poer v. Johnson*, 596, 598 (2).
- How brought into the record, see **APPEAL**.
- Exclusion of, must be made ground for motion for new trial, see **APPEAL** 26; *Leventhal v. Crampton*, 92, 94 (3).
- Will not be weighed on appeal, see **APPEAL**; **NEGLIGENCE** 17.
- In action on note, see **BILLS AND NOTES**.
- To vary a written receipt, see **COMPROMISE** 1; *American Car, etc., Co. v. Smock*, 359, 360 (1), 371 (1).
- Natural laws, notice of, presumed, see **CORPORATIONS**.
- To establish a right of way, see **EASEMENTS** 5.
- In condemnation cases, see **EMINENT DOMAIN**.
- To set aside a deed for fraud, see **FRAUDULENT CONVEYANCES**.
- To correct judgment, see **JUDGMENT** 1; *Kraus v. Thomas*, 437, 441 (4).
- In action for possession, see **LANDLORD AND TENANT** 7.
- Failure of, to show contract for keeping horse, see **LIVERY STABLE KEEPERS**.
- In actions for injuries to servants, see **MASTER AND SERVANT** 14-16.
- In action by fire chief for salary, see **MUNICIPAL CORPORATIONS** 5.
- Of subsequent repairs, not admissible in negligence case, see **NEGLIGENCE** 20; *Harrod v. Bisson*, 549, 555 (2).
- Newly-discovered, see **NEW TRIAL**.
- In malpractice cases, see **PHYSICIANS AND SURGEONS**.
- In quieting title cases, see **QUIETING TITLE**.
- In actions against railroad companies, see **RAILROADS**.
- Showing a sale to a principal, see **SALES**.
- Parol evidence, admissible to apply terms of written contract to subject-matter, see **SPECIFIC PERFORMANCE** 7; *Cincinnati, etc., Railroad v. Wall*, 605, 611 (10), 614 (10).
- In suits for subrogation, see **SUBROGATION**.
- Introduction and exclusion of, see **TRIAL**.
- Of suretyship, see **VENDOR AND PURCHASER**.
- In actions for labor, see **WORK AND LABOR**.
- As to competency of witnesses, see **WITNESSES**.

I. JUDICIAL NOTICE.

- Unnecessary to allege facts of which court takes judicial notice, see **PLEADING** 2; *Wallace v. Coons*, 511, 517 (4).
1. *Sister-State Laws.—Rule of Decision.*—Courts do not take judicial notice of the laws of other states, and the law of the state in which the action is brought determines *prima facie* the rule of decision, a party depending upon the law of another state being required to plead to prove it. *Krouse v. Krouse*, 3, 5 (1).
 2. *Historical Facts.—Civil Laws.*—Courts of other states judicially know that the civil law prevailed in California at the

EVIDENCE—Continued.

time of its admission into the Union, but they do not judicially know whether the civil law has been changed since that time.

Krouse v. Krouse, 3, 7 (4).

3. *Electricity.—Dangers of.*—Courts take judicial notice that 33,000 volts of electricity, if uncontrolled, is dangerous to life, limb and property.

Lake Shore, etc., R. Co. v. Chicago, etc., R. Co., 584, 593 (8).

II. ADMISSION OF EVIDENCE.

4. *Discretion.—Abuse.—Appeal.*—The trial court has a wide discretion as to the form and character of questions asked of witnesses at a trial, and such acts of discretion will be disturbed on appeal only for abuse thereof. *Week v. Rawie*, 599, 602 (4).

III. DOCUMENTARY EVIDENCE.

5. *Shop-Books.—Accounts.—Appeal.*—Original entries in an account book of the payment of interest on notes, made by a deceased payee, are admissible in evidence; and a failure of the court to consider such evidence constitutes reversible error.

Hinshaw v. Security Trust Co., 351, 356 (5).

6. *Shop-Book Entries.—Memoranda.—Notes.*—In an action upon notes, evidence of mere memoranda made by the deceased payee, not a part of any original account book, is not admissible in favor of her estate, constituting mere self-serving declarations.

Hinshaw v. Security Trust Co., 351, 358 (10).

IV. OPINIONS.

7. *Conclusions.—Responsiveness.*—Questions to witnesses should not call for conclusions; and answers of witnesses, whether in a trial, or in the taking of depositions, should be responsive to the questions propounded. *Week v. Rawie*, 599, 601 (3).
8. *Insanity.*—In a suit to set aside an alleged fraudulent conveyance, evidence by a witness as to the conduct and conversations of the grantor at a time remote from the date of the execution of the deed in question, is admissible for the purpose of giving the basis for an opinion as to his mental condition at the time of the execution of the deed. *Humphrey v. Mottier*, 469, 476 (7).

EXCEPTIONS, BILLS OF—

See APPEAL.

Instructions may be brought into the record by a special bill of exceptions, see APPEAL 14; *Republic Iron, etc., Co. v. Lulu*, 271, 279 (6).

Use of.—Cross-Appeals.—Where appellant duly filed a proper bill of exceptions containing the evidence, and after notice to appellant, and its consent thereto, the cross-appellants secured from the court on appeal the right to assign cross-errors on the transcript of the original appellant, such action obviated the need for the filing of another transcript or bill of exceptions.

Peru Heating Co. v. Lenhart, 319, 336 (13).

EXECUTORS AND ADMINISTRATORS—

See ADVANCEMENTS; WORK AND LABOR.

1. *Claims.—Sufficiency.—Bills and Notes.*—A claim against an estate, setting out the fact that decedent owed the claimant two

EXECUTORS AND ADMINISTRATORS—Continued.

notes for certain amounts, that such notes were secured by certain stock, that certain amounts of interest were endorsed on the backs thereof as paid, but failing to set out such notes or copies thereof as exhibits, is sufficient, when attacked for the first time on appeal, the facts stated being sufficient to bar another action therefor, it appearing in the record that two admittedly genuine notes corresponding in dates and amounts to those described were introduced in evidence without objection.

Hinshaw v. Security Trust Co., 351, 354 (1).

2. *Claimants.—Permitting to Testify.—Discretion.—Abuse.*—In an action by a claimant against an executor for services rendered to the testatrix, the trial court's direction that the claimant testify does not constitute an abuse of discretion, where the trial was by the court and where a witness had already testified that the testatrix had said that the claimant, at the death of the testatrix, was to receive for her services certain property.

Dearing v. Coulson, 414, 416 (3).

FALSE REPRESENTATIONS—

See FRAUDULENT CONVEYANCES.

FELLOW SERVANT—

See MASTER AND SERVANT.

FENCES—

Along railroad right of way, see INJUNCTION.

Compelling the construction of, see SPECIFIC PERFORMANCE 7; *Cincinnati, etc., Railroad v. Wall*, 605, 611 (10), 614 (10).

FORECLOSURE—

See MORTGAGES.

FORFEITURE—

See INSURANCE.

FRAUD—

See FRAUDS, STATUTE OF; REFORMATION; TRUSTS.

Question of.—Inferences.—Fraud, when relied on as a cause of action, or as a defense, must be found as a fact, and not be left merely to inference.

Kerbaugh v. Nugent, 43, 55 (10).

FRAUDS, STATUTE OF—

See CONTRACTS; REFORMATION.

1. *Contracts.—Time of Performance.*—The fifth clause of §7462 Burns 1908, §4904 R. S. 1881, providing that "no action shall be brought in any of the following cases: * * * Fifth. Upon any agreement that is not to be performed within one year from the making thereof," does not apply to an oral contract that might be performed within one year, nor to any contract concerning real estate.

Timmonds v. Taylor, 531, 537 (6).

2. *Contracts.—Surety.—Vendor and Purchaser.*—Where a mortgagor conveys the lands in question "subject to all liens," and his grantee conveys such lands to the defendant, making no mention

FRAUDS, STATUTE OF—Continued.

of the mortgage in question, such mortgagor's promise to the defendant to pay such mortgage is not a promise to pay the debt of another, and, therefore, is not within the statute of frauds.

Gregory v. Arms, 562, 575 (14), 577 (14).

FRAUDULENT CONVEYANCES—

Evidence of, in action for damages, see **PHYSICIANS**.

Competency of witnesses in suits to set aside, see **WITNESSES**.

1. *Consideration.—Marriage.—Creditors.—Answers.—Partial.*—In a suit by a creditor to set aside an alleged fraudulent conveyance made by defendant husband to his wife, an answer in bar of the cause of action that the fee of such land was conveyed to the wife, subject to a life estate in the husband, in consideration of marriage and that such marriage had been accordingly consummated, is bad, because, at the time of such conveyance the husband owned a life estate in such land, such interest being subject to the demands of creditors. *McKnight v. Kingsley*, 372, 376 (2).
2. *Intent.—Equitable Rights.—Notice of Creditor's Claim.—Evidence.*—Evidence that the defendant wife before marriage entered into a contract with the defendant husband whereby she would receive his property in consideration of her marriage to him and of caring for him during his sickness, such wife having no knowledge of any claims against him, sustains a judgment for her in a suit to set aside the conveyance so made to her, though at the time the conveyance was actually made she knew of the plaintiff's claim, and though she testified that the conveyance was made to prevent the plaintiff from obtaining the property. *McKnight v. Kingsley*, 372, 376 (3).
3. *Setting Aside.—Persons of Unsound Mind.—Complaint.—Conclusions.*—An allegation, in a complaint to set aside an alleged fraudulent conveyance, that said grantor "was for a long time prior to said proceeding of unsound mind, has so remained ever since, and is now of unsound mind," is not a legal conclusion, but is a sufficient allegation of such grantor's incapacity to execute the conveyance in question. *Batman v. Snoddy*, 132 Ind. 480, distinguished. *Humphrey v. Mottier*, 469, 473 (3).
4. *Setting Aside.—Misrepresentations.—Complaint.*—A complaint to set aside an alleged fraudulent conveyance, averring that the defendants represented to the grantor that they had performed services for him equal in value to the property, and that they well knew they had been paid for all services rendered, when considered with the other allegations of the complaint in reference to the feebleness of the grantor and the weakness of his mind, sufficiently shows that the representations made were untrue. *Humphrey v. Mottier*, 469, 475 (4).

GARNISHMENT—

See **ATTACHMENT**.

HARMLESS ERROR—

See **APPEAL**.

HEATING COMPANIES—

See **CORPORATIONS**.

Liable for negligence, see **NEGLIGENCE** 12.

"HEIRS" AND "HEIRS OF THE BODY"—

See WORDS AND PHRASES.

HUSBAND AND WIFE—

See DESCENT AND DISTRIBUTION; INSURANCE.

Notes executed by husband to wife, not void, see BILLS AND NOTES 1; *Krouse v. Krouse*, 3, 8 (6).

Marriage as a consideration for a deed, see FRAUDULENT CONVEYANCES.

Accrual of right of action to widow, see LIMITATION OF ACTIONS 2.

Competency of, as witnesses, see WITNESSES.

INFANTS—

See PARENT AND CHILD.

Care required by, see MUNICIPAL CORPORATIONS 32; *City of Huntington v. Bartrom*, 117, 119 (1).

INJUNCTION—

See DRAINS; SPECIFIC PERFORMANCE.

1. *Steam Railroads.—Interurban Railroads.—Use of Electricity.—*

Complaint.—A complaint by a steam railroad company to enjoin an interurban railroad company from operating its line, alleging that defendant has installed and is using high-tension currents of electricity, that by induction all electrical conductors in proximity to such system are caused thereby to have similar electrical currents, that such currents interfere with the plaintiff's telegraph lines, that such interference could have been avoided by defendant's installation of electrical devices and appliances, and that upon the completion of defendant's road the interference will destroy plaintiff's use of its telegraph lines, to its damage, does not state a cause of action.

Lake Shore, etc., R. Co. v. Chicago, etc., R. Co., 584, 588 (5), 589 (5), 591 (5), 593 (5), 594 (5).

2. *Deeds.—Covenants.—Breach.—Railroads.—Complaint.*—A com-

plaint alleging that the plaintiff conveyed a right of way to defendant railroad company's agent, that defendant company accepted and occupied such right of way, that a covenant in such deed required the grantee to construct "a standard fence of woven wire, with barbs on top, sufficient to turn all kinds of stock and should permanently maintain a good and lawful fence," that the defendant was threatening to erect an unlawful fence insufficient to turn stock, that the erection of such fence would work irreparable damage to plaintiff and that defendant was insolvent, and praying an injunction, is sufficient when questioned for the first time on appeal.

Cincinnati, etc., Railroad v. Wall, 605, 608 (3).

3. *Legal Remedy.*—Injunctive relief will not be denied on the ground that the plaintiff has a legal remedy, unless the legal remedy is as full and adequate as the remedy in equity.

Cincinnati, etc., Railroad v. Wall, 605, 608 (4).

4. *Deeds.—Covenants.—Fences.—Railroads.*—Where plaintiff's deed

to a railroad company provided for the construction and maintenance by the company of a fence "sufficient to turn all kinds of stock," and the company was threatening to build an insufficient fence, the plaintiff's remedy in equity is much more adequate

INJUNCTION—Continued.

than his remedy at law, especially where plaintiff used his lands for grazing purposes.

Cincinnati, etc., Railroad v. Wall, 605, 609 (5).

5. *Multiplicity of Suits.—Defective Fences.*—Where defendant railroad company agreed to construct and maintain a fence "sufficient to turn all kinds of stock" along its right of way through plaintiff's land, equity will restrain the construction of an insufficient fence on the ground that it will prevent a multiplicity of actions for a breach of the covenant.

Cincinnati, etc., Railroad v. Wall, 605, 609 (6), 610 (6).

6. *Deeds.—Covenants to Construct Fence Along Railroad Right of Way.—Statutes.*—The fact that railroad companies are required by statute to fence their rights of way, does not prevent them from contracting to construct and maintain a particular kind of fence; and they may be enjoined from constructing a different kind of fence from the one contracted for.

Cincinnati, etc., Railroad v. Wall, 605, 610 (7).

7. *Restraining Breach of Covenant.—Specific Performance.*—The breach of a contract enforceable by specific performance may be enjoined, the remedy of injunction against a breach being a negative specific performance.

Cincinnati, etc., Railroad v. Wall, 605, 610 (8).

8. *Legal Remedy.—Election.*—The fact that plaintiff chose an equitable remedy when he might have secured relief in an action at law, is not a sufficient answer to a suit in equity.

Cincinnati, etc., Railroad v. Wall, 605, 612 (11).

9. *Partial Relief.*—Injunctive relief will not be denied on the ground that full relief cannot be awarded; and if one party has fully performed his part of the contract, and the other is in the enjoyment of his rights secured by the contract, he may be enjoined from violating the express affirmative provisions on his part.

Cincinnati, etc., Railroad v. Wall, 605, 612 (12).

10. *Breach of Covenant to Fence.—Deeds.—Agency.*—A railroad's breach of covenant to build a particular kind of fence may be enjoined; and the fact that the deed containing the covenant was executed to the company's agent does not affect the matter, where the company was in possession of the land and accepting the benefits of the grant.

Cincinnati, etc., Railroad v. Wall, 605, 614 (15).

INSANE PERSONS—

Evidence of insanity, see EVIDENCE 8.

INSTRUCTIONS—

See TRIAL.

INSURANCE—

See WAIVER.

1. *Lex Loci Contractus.—Loans.—Place of.—Husband and Wife.—Suretyship.*—An insurance policy issued by a New York company, and providing that the "contract contained in such policy and * * * application shall be construed according to the law of the State of New York, the place of said contract being agreed to be the home office of the company," and providing further that "the amount loaned [on the policy] at any time shall be such as

INSURANCE—Continued.

the insured may desire," and that the "policy shall be duly assigned to the company as collateral security for the loan," and a loan agreement executed by the insured and his wife who was the beneficiary in the policy, providing that such agreement was "made under and pursuant to the laws of the State of New York, the place of said contract being said home office of said company," are governed by the laws of New York, and the wife's rights as beneficiary, are subject to the rights and actions of the assured under the provisions of the policy.

Eagle v. New York Life Ins. Co., 284, 295 (2), 297 (2).

2. *Married Women.—Rights of.—New York Statute.*—The New York statute providing that "a married woman may, in her own name, cause the life of her husband to be insured for a definite time," and that when she survives such time she is entitled to receive the insurance money as her separate property "free from any claim of a creditor * * * of her husband," and that "a policy of insurance on the life of any person for the benefit of a married woman is also assignable * * * and may be surrendered * * * by her * * * with the written consent of the assured," applies to insurance taken by a wife upon the life of her husband, and not to a policy taken by the husband in which the wife is named as beneficiary; and the wife is authorized to assign, with her husband's written consent, a policy so taken by her. *Eagle v. New York Life Ins. Co.*, 284, 296 (3).

3. *Options.—Right to Exercise.*—The husband has the right to exercise the options provided in an insurance policy taken out by him, where his wife is named as beneficiary, and where he has the reserved right of changing beneficiaries at any time.

Eagle v. New York Life Ins. Co., 284, 296 (5).

4. *Contracts.—Suretyship.—Married Women.—Statutes.*—The Indiana statute (§7855 Burns 1908, §5119 R. S. 1881) declaring void all contracts of suretyship executed by married women, does not apply to a loan obtained by a husband and his wife on an insurance policy, where the provisions for the loan in question were contained in the policy in which such wife's rights were acquired.

Eagle v. New York Life Ins. Co., 284, 297 (6).

5. *Loans.—Forfeiture.—Waiver.—Prejudice.*—An agreement by an insurance company to be lenient with a borrower and not to enforce a forfeiture, the written contract for the loan providing for a forfeiture, though probably unenforceable, must be shown to have been violated to the beneficiary's prejudice, before the beneficiary can found a claim thereon.

Eagle v. New York Life Ins. Co., 284, 298 (7).

6. *Extended.—Conditions Precedent.—Failure to Perform.*—An action for extended insurance cannot be maintained, where the policy provided that the payment of any loan to the assured should be a condition precedent to the automatic extension of such insurance and where the assured had failed to pay his loan.

Eagle v. New York Life Ins. Co., 284, 299 (8).

7. *Contracts.—Obligations of.*—A provision in an insurance indemnity contract requiring the assured to file a final statement of its claim "in the manner prescribed by" the insurer, "upon blank forms" furnished upon application, is not ambiguous, and is binding upon the parties, unless waived.

Shedd v. American Credit, etc., Co., 23, 28 (2).

INSURANCE—Continued.

8. *Contracts.—Construction.*—Doubtful insurance contracts will be construed most strongly against the insurer, but a new contract will not be made by the court, and the provisions of the contract actually made, when free from fraud and not waived, will be enforced. *Shedd v. American Credit, etc., Co.*, 23, 28 (3).
9. *Indemnity.—Reports.*—A credit indemnity policy providing that the assured within thirty days from the expiration of the policy shall make "a final statement of the claim * * * in the manner prescribed * * * upon blank forms * * * furnished upon application" requires the assured to make the application for such blanks as a condition precedent to fixing a liability upon the insurer. *Shedd v. American Credit, etc., Co.*, 23, 30 (7).
10. *Policies.—Voidable.—Election.—Rescission.—Return of Consideration.*—The so-called void clauses of an insurance policy render such policy voidable, in case of a breach thereof, at the election of the insurer; and in order to rescind such contract the insurer must return the benefits received. *State Life Ins. Co. v. Jones*, 186, 187 (1).
11. *Loans on Policy.—Forfeitures.*—In an insurance policy upon which the assured and his beneficiary had borrowed money from the company, pledging the policy as a security therefor, a provision that "if any premium on said policy or any interest on said loan is not paid on the date when due, * * * such pledge shall, without demand or notice of any kind, * * * be foreclosed by said company, by deducting the amount due on said loan from the reserve on said policy," is not invalid on the ground that the legal requirements for a foreclosure are not granted thereby. *Eagle v. New York Life Ins. Co.*, 284, 293 (1).
12. *Waiver.—Custom.*—The custom of an insurance company followed for many years under former contracts, with reference to the reporting and adjusting of the plaintiff's losses by insolvency, cannot form the basis for a waiver of a provision in the present policy, identical with former ones, that the assured, within thirty days from the expiration of the policy, shall make "a final statement of the claim * * * in the manner prescribed * * * upon blank forms * * * furnished upon application." *Shedd v. American Credit, etc., Co.*, 23, 29 (5), 30 (5).
13. *Credit Indemnity.—Current and Final Reports.—Waiver.*—A credit indemnity policy which provides in one section that the assured shall notify the insurer "within twenty days after the indemnified has received first information of the insolvency of the debtor," and in another section, that the assured shall furnish a complete statement of the whole claim within thirty days from the expiration of the policy, is not complied with, where only the reports of insolvency are furnished, since they do not furnish the information desired where the aggregate claim is asked for. *Shedd v. American Credit, etc., Co.*, 23, 31 (8).
14. *Beneficiary.—Right of Change.—Effect.*—The beneficiary of an insurance policy does not have a vested right therein, where the assured is authorized to change beneficiaries. *Eagle v. New York Life Ins. Co.*, 284, 296 (4).
15. *Credit Indemnity.—Failure to Perform Contract.—Waiver.—Complaint.*—A complaint upon a credit indemnity insurance contract, which shows that a provision of the policy was not complied with by assured, is bad, unless a waiver thereof is shown. *Shedd v. American Credit, etc., Co.*, 23, 28 (1).

INSURANCE—Continued.

16. *Mutual Benefit.—Beneficiaries.—Complaint.*—A complaint by the party named as the beneficiary in the certificate of a mutual benefit society, against such society and a contesting beneficiary claiming under a different benefit certificate, is not bad as to such contesting beneficiary, though it would be as to the society, for failing to allege that the plaintiff and the assured had done all things required of them to be performed, or the facts showing that they had performed such conditions.
McKeon v. Ehringer, 226, 229 (1).
17. *Mutual Benefit.—Beneficiaries.—Volunteers.*—A mere volunteer beneficiary of a mutual benefit certificate on the life of another, acquires no vested right therein until the death of the assured.
McKeon v. Ehringer, 226, 232 (2).
18. *Mutual Benefit.—Beneficiaries.—Equitable Rights of.*—Where a daughter agreed with her father to pay his assessments in a beneficiary society in consideration of his making her the beneficiary of his certificate therein, and she performed her agreement, he cannot, without her consent, substitute another as the beneficiary thereof. *Bunyan v. Reed*, 34 Ind. App. 295, distinguished.
McKeon v. Ehringer, 226, 232 (3).

INTERROGATORIES—

See TRIAL.

INTERSTATE COMMERCE—

See COMMERCE.

INTERURBAN RAILROADS—

See RAILROADS.

"ISSUE"—

See WORDS AND PHRASES.

JUDGES—

Opinions form no part of transcript, though copied therein, see APPEAL 13; *Hinshaw v. Security Trust Co.*, 351, 356 (6).

JUDGMENT—

By agreement, cannot be appealed from, see APPEAL 21; *Maiben v. Manlove*, 617, 621 (4).

Erroneous, remedy for, by appeal, see DRAINS 3; *Furness v. Brummitt*, 442, 445 (3).

As to collateral attack on street-improvement assessment, see MUNICIPAL CORPORATIONS 16, 18; *Brownell Improv. Co. v. Nixon*, 195.

Motions in arrest, see PLEADING 28, 29.

Error in, does not render void, see QUIETING TITLE 1; *Kraus v. Thomas*, 437, 441 (3).

1. *Errors.—Correcting.—Evidence.*—A decree erroneously describing real estate can be corrected in a proper proceeding; and other evidence besides the decree is admissible.

Kraus v. Thomas, 437, 441 (4).

2. *Void.*—A void judgment is a nullity.

Furness v. Brummitt, 442, 446 (4).

JUDGMENT—Continued.

3. *Final. — Subsequent Change. — Boards of Commissioners. —* Boards of commissioners have no power to change final orders made in cases over which they have jurisdiction, and where such orders are made when they are in lawful session.
Furness v. Brummitt, 442, 447 (5).

JUDICIAL NOTICE—

See EVIDENCE.

JURISDICTION—

See COURTS; DRAINS.

Of appeals, see APPEAL.

JURY—

Verdict, on conflicting evidence, conclusive, see APPEAL 56-63.

Whether right of way was obtained by prescription, question for, see EASEMENTS 8; *Lucas v. Rhodes*, 211, 220 (5).

Evidence requiring submission of case to, see MASTER AND SERVANT 16.

Whether gutter was dangerous, question for, see MUNICIPAL CORPORATIONS 27, 28; *City of Indianapolis v. Schoenig*, 76.

JUSTICES OF THE PEACE—

*Procedure.—Defenses.—When Required to be Pleadcd.—*In an action before a justice of the peace, all defenses except the statute of limitations, set-off, matter in abatement, and *non est factum*, may be given in evidence under the general denial (§1749 Burns 1908, §1460 R. S. 1881).
Krouse v. Krouse, 3, 5 (2).

LACHES—

See REFORMATION.

LANDLORD AND TENANT—

1. *Leases.—Implied Covenant for Possession and Quiet Enjoyment.—*Every lease contains an implied covenant for possession and quiet enjoyment.

Voss v. Capital City Brewing Co., 476, 479 (2).

2. *Rents.—Parts of Crop.—Life Tenants.—Remaindermen.—*Rents due to a life tenant at his death are collectible by his personal representative; but grain rent, to be paid at threshing time, is not due until such time, and, being annexed to the real estate, descends with the reversion to the remaindermen.

Vaictcr v. Frame, 481, 483 (1).

3. *Leases.—Cropping on Shares.—Tenancies in Common.—Remainders.—*A lease executed by the life tenant of a farm, providing that the lessee should "in a good and husbandlike manner * * * break and plow said parts of said land so let and rented to him, * * * and * * * deliver one-third of all the grain * * * to said [lessor], as the part, interest and share of said annual crop * * * to be so received by, and belonging to, said [lessor], * * * said [lessee] to receive as his part, and in payment for the work and labor done by him, and expenses incurred by him in the production of said * * * crops, two-thirds of * * * the grain * * * together with the straw," the life tenant occupying the farm and directing the sowing of the crops, and the manner thereof, constitutes the parties thereto tenants in common of the crops raised, the words "let" and "rent" being in common use in describing cropping arrangements, regardless

LANDLORD AND TENANT—Continued.

of their technical legal meaning; and upon the death of the life tenant before a division of the crop, her share passes to her personal representative, and not to the remainderman.

Vawter v. Frame, 481, 483 (3).

4. Complaint.—Failure to Allege Written Lease.—Presumptions.—

A complaint alleging that the plaintiff is the owner and entitled to the possession of certain premises, that defendant was a tenant by the year, that notice to deliver possession of the premises was served on him ninety days prior to the expiration of his tenancy, a copy thereof being made part of the complaint, and that defendant unlawfully holds over, is sufficient; and the presumption, in the absence of an allegation that the lease was in writing, is, that it was oral.

Wah Kee v. Clark, 462, 463 (1).

5. Tender.—Answer.—In an action by a landlord to recover possession of his property, an answer of tender by the tenant failing to allege the amount due, or to show any connection between the tender and the damages alleged in the complaint, the damages and the tender being for different amounts, or to show whether the tender was accepted, refused, or brought into court, is insufficient.

Wah Kee v. Clark, 462, 464 (4).

6. Possession.—Failure to Give.—Answers.—In an action by a landlord for rent, answers by the tenant that the landlord failed to yield possession of the leased premises are sufficient.

Voss v. Capital City Brewing Co., 476, 479 (1).

7. Leases.—Subletting.—Evidence.—Weighing.—Appeal.—Evidence that the plaintiff leased to defendant certain property, agreeing to yield possession at the expiration of the existing tenancy, that the defendant lessee was authorized to collect the rents for the remainder of the existing tenancy, that defendant collected such rents, accounting therefor to the plaintiff, that no notice to quit was given to determine the existing lease and the lessee held over, and that the defendant lessee paid rent for five months, will not be weighed on appeal, where there is evidence in conflict therewith sufficient to support the decision of the court.

Voss v. Capital City Brewing Co., 476, 479 (3).

LAST CLEAR CHANCE—

See RAILROADS 18.

LEASES—

See LANDLORD AND TENANT.

LIENS—

See MECHANICS' LIENS; SUBROGATION.

For street improvements, see MUNICIPAL CORPORATIONS 13; *Gubbins v. Harrington*, 488, 491 (4).

Selling land subject to, see VENDOR AND PURCHASER.

Superiority.—Common Law.—Statute.—At the common law the superiority of liens was fixed by the time of their attaching, but a different rule may be fixed by statute.

Brownell Improv. Co. v. Nixon, 195, 199 (1).

LIFE ESTATES—

Condemnation of, see EMINENT DOMAIN.

Crops.—Remaindermen.—Growing annual crops belonging to a life tenant constitute personal property and pass at her death to her estate.

Vawter v. Frame, 481, 483 (2).

LIMITATION OF ACTIONS—

1. *Bills and Notes.*—Notes that appear upon their face to have been due more than ten years preceding the filing of an action thereon are *prima facie* barred by the statute of limitations.
Hinshaw v. Security Trust Co., 351, 355 (3).
2. *Coal Mines.—Mortal Injury to Miner.—Accrual of Right of Action to Widow and Children.—Time of.*—Under §8597 Burns 1908, Acts 1907 p. 208, providing that “for any injury to person or persons * * * occasioned by any violation of this [mining] act, * * * a right of action shall accrue to the party injured * * * and in case of loss of life, by reason of such violation, a right of action shall accrue; first, to the widow, if any;” and if none, then to other dependents, an action by a widow for the negligent killing of her husband in violation of the mining law, brought within two years after his death, is not barred by the statute of limitations, though he lived three years after he sustained the injury, but filed no action therefor.
Wilson v. Jackson Hill Coal, etc., Co., 150, 151 (1), 154 (1).
3. *Amended Complaint.—Tort.—Contract.—Physicians.—Malpractice.*—In an action against a physician for damages for malpractice, an amended complaint sounding in tort, filed more than two years after the negligence alleged, is not barred by the two-year statute of limitations, where the original complaint, also sounding in tort, was filed within such time.
Harrod v. Bisson, 549, 561 (9).

LIQUIDATED DAMAGES—

See CONTRACTS 27.

LIVERY STABLE KEEPERS—

Animals.—Care of.—Compensation.—Evidence.—Contracts.—Where a judgment was rendered in favor of a defendant livery stable keeper on his counterclaim alleging that the plaintiff agreed to pay the regular price for board for his horse cared for by defendant, and there was no evidence tending to show such regular price, the judgment is not supported by the evidence.
Meyer Bros. Coffee, etc., Co. v. Pauley, 412, 413 (2).

MANDATE—

See APPEAL 65, 66.

MASTER AND SERVANT—

See MINES.

Accrual of right of action in favor of widow, where husband died after lingering, see LIMITATION OF ACTIONS 2; *Wilson v. Jackson Hill Coal, etc., Co.*, 150, 151 (1), 154 (1).

1. *Relation of.—Mines.—Shot Firers.*—A shot firer in a coal mine is a servant of the operator of the mine whether employed directly by such operator, or indirectly, as an assistant to the miners.
Princeton Coal, etc., Co. v. Downer, 136, 141 (1), 143 (1).
2. *Coal Mines.—Shot Firers.—Defective Partitions.*—A complaint by a shot firer in a coal mine, alleging that the plaintiff was employed by defendant as a servant in its coal mine, that neither the defendant nor its mine boss visited the rooms in the mine at any time, that the pillars between the rooms were negligently permitted to be made less than fifteen feet thick, that defendant knew thereof and plaintiff did not, that a fellow servant, ignorant of such conditions of the partition, bored a hole therein, placed and fired a shot therein, to the injury of plaintiff, who was in an adjoining room, and that the defendant employed more than

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- 100 men in such mine, states a cause of action; and another paragraph alleging the same facts except that the plaintiff was elected and employed by the miners with the consent of defendant, and that defendant paid to such miners certain sums of money with which to pay the wages of the plaintiff, also states a cause of action. *Princeton Coal, etc., Co. v. Downer*, 136, 142 (5).
3. *Defective Machinery.—Inspection.*—It is a master's duty to make inspection of machinery for ascertaining any defects therein, produced from any cause, but a failure to discover defects that are not discoverable by the use of ordinary care does not constitute negligence. *Ittenbach v. Thomas*, 420, 429 (6).
4. *Railroad.—Injuries.—Releases.—Promise of Work.*—Where a servant was injured by a railroad company and the company's claim agent offered him \$250 and a "lifetime job" for a release, and the instrument of release, which failed to mention the "lifetime job," was sent to him for execution, and he refused to execute it but wrote to the claim agent who answered that he had nothing to do with positions and that plaintiff "could not expect" anything until the release was signed, and that after the release was signed such agent would take up the matter of employment and see if anything could be done, and the plaintiff took the release to the superintendent who told the plaintiff to sign the release and he would get the money and also the job, the jury was warranted in finding that the company agreed to give the money and the position for such release.
Illinois Cent. R. Co. v. Fairfield, 300, 302 (2).
5. *Railroads.—Injuries.—Releases.—Consideration.—Repudiation of Part.—Estoppel.*—A railroad company agreeing to give its injured servant \$250 and a "lifetime job" in consideration of a release cannot insist upon the validity of such release and at the same time deny its agents' authority to offer an injured servant a "lifetime job." *Illinois Cent. R. Co. v. Fairchild*, 300, 304 (3).
6. *Latent Dangers.—Duty to Warn.*—It is the master's duty to warn servants of the latent dangers of their service.
Republic Iron, etc., Co. v. Lulu, 271, 276 (2), 277 (2).
7. *Concurrent Negligence of Fellow Servant.—Effect.*—The concurrent negligence of a fellow servant with that of the master in producing an injury to a servant does not relieve the master from liability.
Princeton Coal, etc., Co. v. Downer, 136, 142 (4).
8. *Railroads.—Employers' Liability Act.*—A complaint founded upon section one of the employers' liability act (Acts 1893, p. 294, §8017 Burns 1908), providing that "every railroad * * * in this State, shall be liable for damages for personal injury, * * * Second. Where such injury resulted from the negligence of any person in the service of such corporation, to whose order or direction the injured employe at the time of the injury was bound to conform, and did conform," alleging that defendant railroad company's boss of its bridge gang negligently ordered him to help in a specified way to unload piling from a flat car, and that in carrying out such order he was injured, should be held sufficient.
Bennett v. Evansville, etc., R. Co., 147, 148 (1).
9. *Railroads.—Defective Pilots.—Negligent Orders.*—A complaint by a railroad brakeman, alleging that defendant railroad company's locomotive engineer directed him to go upon the pilot of the engine and to flag a certain approaching train, that such pilot was defective, of which defendant had knowledge and plaintiff had not, and that under the weight of his body it broke, injuring

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- him, is sufficient when attacked for the first time on appeal, the rule being that if there is not a total failure to allege some material fact, the complaint will be sufficient, all intendments being in its favor. *Chicago, etc., R. Co. v. Kiracofe*, 407, 408 (1).
10. *Removing Slag.—Explosions.—Failure to Warn.—Proximate Cause.—Complaint.*—A complaint alleging that defendant operated a foundry, that the plaintiff was employed to remove slag, that he knew nothing of the dangers of an explosion thereof by the contact of water therewith, that defendant knew thereof but failed to warn him, that defendant negligently left pools of water near such slag, and that the plaintiff, while performing his work, stepped therein, splashing water upon the slag and causing an explosion, to his injury, sufficiently shows defendant was negligent, that its negligence was the proximate cause of the injury, and that the accident was one that the defendant should have anticipated. *Republic Iron, etc., Co. v. Lulu*, 271, 275 (1), 278 (1).
11. *Coal Mines.—Props.—Registering Need Thereof.—Complaint.*—In a complaint for personal injuries alleged to have been sustained because of a lack of props for a coal mine in which plaintiff was employed, it is not necessary to allege that plaintiff registered a request for props on the blackboard provided for that purpose. *Muren Coal, etc., Co. v. Copland*, 46 Ind. App. 230, followed. *Peabody, etc., Coal Co. v. Yandell*, 615, 616 (1).
12. *Coal Mines.—Power to Make Roof Secure.—Complaint.—Transfer.*—Whether a complaint by a miner for injuries sustained because of an insecure roof in a coal mine must allege that such roof could have been made safe, is a question the Appellate Court cannot decide where there is an equal division of the judges on such question, and the case will be transferred to the Supreme Court. *Peabody, etc., Coal Co. v. Yandell*, 615, 616 (2).
13. *Relationship.—Burden of Proof.—Variance.*—In an action by a coal miner for injuries received, the burden is upon him to show that the relationship of master and servant exists between him and defendant; and he must recover, if at all, upon the cause of action alleged. *Princeton Coal, etc., Co. v. Downer*, 136, 142 (2).
14. *Defective Valves.—Fall of Hammer.—Evidence.*—Where the complaint alleged that the valve designed to hold the air, by the force of which the hammer was held up until released by a lever, was old and allowed the air to escape into the cylinder, which pressure allowed the hammer to fall, to plaintiff's damage, evidence that such hammer would fall by its own weight upon opening the valve and that it was held in position by compressed air, and that the valve permitted air to leak into the cylinder, does not support the complaint, since the leaking of air into the cylinder would cause the hammer to stay up, rather than cause it to fall. *Mesker v. Leonard*, 642, 646 (3).
15. *Coal Mines.—Duties of Boss.—Evidence.*—In an action for damages by a shot firer in a coal mine, evidence is competent showing why pillars of coal were left standing between the rooms therein, what were the duties of the mine boss in respect to such pillars and as to the giving of notice to shot firers of a shot placed for the making of a "break-through," and the proper location of the "break-through;" and such shot firer, as well as other miners, was a competent witness as to such facts. *Princeton Coal, etc., Co. v. Downer*, 136, 145 (11).
16. *Coal Mines.—Blasting.—Evidence.—Jury.*—Evidence that a shot firer was hired by the miners in a coal mine with the oper-

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ator's knowledge and consent, that while in a room a shot was fired by a miner in an adjoining room, injuring plaintiff because the partition wall was too thin, that it was not the duty of the shot firer to ascertain the thickness of the wall and that he could not have known such thickness except by an examination, and that the miner who fired the shot did not know the thickness thereof, requires a submission to the jury of the questions of defendant's negligence and plaintiff's contributory negligence.

Princeton Coal, etc., Co. v. Downer, 136, 146 (12).

17. *Instructions.—Essentials for Recovery.—Omission of Material Fact.*—In an action by the personal representative of a decedent against the defendant for negligence causing the death of said decedent, an instruction purporting to set out all the facts essential to plaintiff's right of recovery, but which omits the decedent's want of notice, actual or constructive, of the alleged defect in the machinery causing his death, is fatally erroneous, and cannot be cured by other instructions announcing the correct rule.

Ittenbach v. Thomas, 420, 435 (8).

18. *Railroads.—Rules.—Breach.—Emergencies.—Instructions.*—Where defendant railroad company requested an instruction that if the company laid down rules and put them into the hands of the plaintiff brakeman, it was his duty to obey them, the court's modifications of such instruction by adding thereto that if conditions arose where the rules could not be followed, it was the brakeman's duty to take such steps as ordinarily prudent men would take to prevent loss of life, or property, was warranted.

Chicago, etc., R. Co. v. Kiracofe, 407, 410 (4).

19. *Railroads.—Brakemen.—Riding upon Pilot.—Instructions.*—In an action by a brakeman for injuries sustained while riding upon the pilot of an engine at the command of his locomotive engineer for the purpose of flagging an approaching train, a requested instruction that under such circumstances he could not recover, was properly refused, the question of contributory negligence in such case being for the jury.

Chicago, etc., R. Co. v. Kiracofe, 407, 411 (5).

20. *Assumption of Risk.—Instructions.*—An instruction that does not purport to enumerate the elements essential to a recovery, by a brakeman, for injuries sustained, is not bad for failure to include the element of assumption of risk, the jury having theretofore been fully instructed on such point.

Chicago, etc., R. Co. v. Kiracofe, 407, 411 (6).

21. *Coal Mines.—Shot Firers.—Instructions.*—In an action for damages by a shot firer in a coal mine, an instruction that if the miners elected to have plaintiff employed as a shot firer, and contributed to the payment of his wages, such payment being made through appellant, plaintiff was neither a trespasser, nor a mere licensee, in such mine, and that defendant would owe him the duty, while so engaged, to furnish him a reasonably safe place in which to work, is correct.

Princeton Coal, etc., Co. v. Downer, 136, 144 (7).

22. *Coal Mines.—Rooms.—Mining Boss.—Instructions.*—In an action for damages by a shot firer in a coal mine, an instruction that if the jury should find that it was the duty of the mine boss to direct and govern the form and location of the rooms and that it was his duty to make the partition walls fifteen feet thick and he negligently failed to do so, that at the place the shot

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was fired such wall was only five to seven feet thick, that this was the proximate cause of the injury, that the plaintiff was not guilty of contributory negligence and that the risk was not assumed, the verdict should be for the plaintiff, is a correct statement of the law. *Princeton Coal, etc., Co. v. Downer*, 136, 144 (8).

23. *Coal Mines.—Damages.—Issues.—Instructions Concerning.*—In an action by a coal miner for damages for personal injuries, an instruction that the preponderance of the evidence must establish the injury substantially as alleged, and that the injury was caused by the negligence of defendant, but that if the plaintiff was an experienced miner and knew as well as defendant of the danger, he cannot recover, furnishes to defendant no cause for complaint. *Princeton Coal, etc., Co. v. Downer*, 136, 145 (9).

24. *Coal Mines.—Shot Firers.—Contributory Negligence.—Assumption of Risk.—Instructions.*—In an action by a shot firer in a coal mine for damages caused by the alleged negligence of the operator of such mine in making the partition walls of the rooms too thin, thereby causing a shot to break through the wall to plaintiff's injury, the elements of contributory negligence and assumption of risk enter, and an instruction thereon is proper. *Princeton Coal, etc., Co. v. Downer*, 136, 145 (10).

25. *Latent Dangers.—Failure to Warn.—Instructions.*—An instruction that it is the duty of a master to warn his servant who is ignorant of a danger, known to the master, is not misleading on the ground that it required the master to warn the servant against obvious dangers, where the complaint and the evidence showed that the servant was injured by splashing water upon hot slag, thereby causing an explosion.

Republic Iron, etc., Co. v. Lulu, 271, 279 (7).

26. *Latent Dangers.—Duty to Warn.—Instructions.*—In an action by a servant against defendant iron company for negligence in failing to warn him of the dangers of the contact of water with hot slag, an instruction that the duty of the master to instruct an ignorant servant of latent dangers is commensurate with the danger to be apprehended, is not prejudicial.

Republic Iron, etc., Co. v. Lulu, 271, 280 (8).

27. *Latent Dangers.—Implied Notice.—Instructions.*—"Must."—"May."—In an action by a servant against defendant iron company for failing to inform him of the latent danger of the contact of water with hot slag, the refusal of an instruction, that if the jury should find that the plaintiff worked in close proximity to such slag prior to his injury and that it was common knowledge among the employes that the contact of water with hot slag would cause an explosion, the jury must consider such evidence on the question of such servant's notice of such danger, is not erroneous, since said instruction confines the jury to the bare facts stated therein. Roby, J., concurs.

Republic Iron, etc., Co. v. Lulu, 271, 280 (9).

28. *Defective Machinery.—Interrogatories.*—In an action by the administrator of a deceased servant against his master, the first paragraph of complaint alleging negligence in providing a crane with old and rotten rails to rest the cab upon, and in providing weakened and crystallized hog chains for lifting the loads, answers to interrogatories to the jury that the death was caused solely by the crystallization and breaking of the hog chain, and

MASTER AND SERVANT—Continued.

that the crystallization thereof was undiscoverable by the use of ordinary care, are irreconcilable with a general verdict for the plaintiff on such issues. *Ittenbach v. Thomas*, 420, 427 (5), 429 (5).

29. *Defective Machinery.—Interrogatories.*—In an action by an administratrix for the death of her decedent caused by the alleged negligence of defendant in providing a crane with hog chains negligently adjusted so that one chain bore the entire load and the consequent breaking thereof, answers to the interrogatories to the jury that the chain broke because of the improper adjustment, that there was nothing to indicate that the chain was insufficient to carry the load placed upon it and that decedent was in a better position than any one else to ascertain whether any particular chain should be tightened or slackened are not irreconcilable with a verdict for the plaintiff as to such issue, since evidence was admissible to show that the decedent was away when the adjustment was made and had just returned and knew nothing thereof. *Ittenbach v. Thomas*, 420, 430 (7), 434 (7).

30. *Railroads.—Defective Pilots.—Interrogatories.—Verdict.*—In an action by a brakeman for injuries received because of an alleged defective pilot, on which he was riding by order of his locomotive engineer, answers to interrogatories that the plaintiff went through the cab window and upon the pilot while the engine was moving, that the nose of the pilot struck a rail at a crossing and was broken, that it did not fall by reason of plaintiff's weight as alleged, that the plaintiff was ordered by the locomotive engineer to flag an approaching train and that the plaintiff could not do so without riding on such pilot, and that he had been furnished a book of rules, which he had agreed to study, are not irreconcilable with a general verdict for plaintiff. *Chicago, etc., R. Co. v. Kiracofe*, 407, 409 (2).

31. *Contributory Negligence.—Riding upon Engine Pilot.—Jury.*—Whether a brakeman was guilty of contributory negligence in riding, under the order of his locomotive engineer, upon the pilot of an engine in order to flag an approaching train, is a question for the jury. *Chicago, etc., R. Co. v. Kiracofe*, 407, 410 (3).

MAXIMS—

Actio personalis moritur cum persona: A personal right of action dies with the person; *Wilson v. Jackson Hill Coal, etc., Co.*, 150, 154.

Damnum absque injuria: Loss, hurt or harm without injury in the legal sense, *Lake Shore, etc., R. Co. v. Chicago, etc., R. Co.*, 584, 587.

Expressio unius est exclusio alterius: The express mention of one thing implies the exclusion of another; *Straus v. Yeager*, 448, 458.

Sic utere tuo alienum non laedas: So use your own as not to injure another; *Niagara Oil Co. v. Jackson*, 238, 241; *Peru Heating Co. v. Lenhart*, 319, 326; *Lake Shore, etc., R. Co. v. Chicago, etc., R. Co.*, 584, 587.

"MAY"—

See WORDS AND PHRASES.

MECHANICS' LIENS—

Contractors.—Subcontractors.—Prior to the taking effect of the act of 1909 (Acts 1909 p. 295) a mechanic's lien could not be enforced on behalf of a contractor or subcontractor.

Shutt v. Smith, 160, 161 (1).

MINES—

See MASTER AND SERVANT 11, 12.

When right of action accrues to widow, where husband was mortally injured in a coal mine, see LIMITATION OF ACTIONS 2.

Evidence in actions for injuries in, see MASTER AND SERVANT 15, 16.

Instructions in actions for injuries in, see MASTER AND SERVANT 21-24.

Duties of Inspection.—Reliance upon Performance of.—It is the common-law and the statutory duty of the operator of a coal mine to inspect the working places of miners and keep them in a reasonably safe condition for the use of servants; and an employe has the right to rely upon the operator's performance of such duty. *Princeton Coal, etc., Co. v. Downer*, 136, 142 (3).

MISJOINDER—

Failure to move to separate causes waives question as to propriety of receiving separate verdicts, see APPEAL 9; *Perley v. Schmidt Cut Stone Co.*, 344, 348 (5).

MISREPRESENTATIONS—

See FRAUDULENT CONVEYANCES.

MISTAKE—

See REFORMATION.

MORTGAGES—

As to series of notes secured by, see BILLS AND NOTES 5; *Kerbaugh v. Nugent*, 43, 51 (5).

1. *Default in Payment.—Equitable Relief.*—Where a mortgagor defaults in the payment of one of a series of notes, thereby causing the entire debt to become due, equity will refuse relief, except for good cause shown. *Kerbaugh v. Nugent*, 43, 51 (6).
2. *Failure to Pay.—Excuses.—Inequitable Misconduct of Mortgagee.*—Where a mortgagee's inequitable, but not necessarily fraudulent misconduct is the cause of the mortgagor's failure to pay a note at its maturity, equity will not permit the foreclosure of the mortgage, provided the mortgagor is ready to pay the note. *Kerbaugh v. Nugent*, 43, 52 (8), 55 (8).

MOTIONS—

See PLEADING.

MULTIPLICITY OF SUITS—

See INJUNCTION 5.

MUNICIPAL CORPORATIONS—

See WATERS.

Appellate Court has no jurisdiction of appeal from judgment for street assessments, where circuit court had none, see APPEAL 1; *Holderman v. Town of North Manchester*, 491, 494 (4).

Verdict that street was defective, conclusive on appeal, where evidence was conflicting, see APPEAL 61; *City of Indianapolis v. Schoenig*, 76, 80 (5).

Violating ordinances of, see RAILROADS.

1. *Officers.—Fire Chief.—Removal.*—Under §8781 Burns 1908, Acts 1905 p. 219, §160, providing that "every member of the fire and police forces, and all other appointees of the commissioners of public safety, shall hold office until they are removed by the

MUNICIPAL CORPORATIONS—Continued.

board" and that "they may be removed for any cause other than politics," after a hearing upon preferred charges, a fire chief of a city of the third class cannot be removed for political reasons.

Leonard v. City of Terre Haute, 104, 110 (1).

2. *Officers.—Fire Chief.*—Under §8780 Burns 1908, Acts 1905 p. 219, §159, providing that the board of public safety "shall appoint * * * a chief of the fire force and all other officers, members and employes of such fire" force, such chief is a public officer and can be discharged from such office only as the statute directs.

Leonard v. City of Terre Haute, 104, 110 (2).

3. *Firemen.—Fire Chief.—Salary.—Complaint.*—A complaint in two paragraphs, the first of which alleges that the plaintiff was fire chief of defendant city of the third class, that the board of safety discharged him for political reasons only, and that a certain sum is due to him as salary, the second, alleging that he had been a member of the fire force for twenty years and had never been dismissed and that there was due to him a certain sum, is sufficient, such discharge being void, such complaint entitling plaintiff to recover upon one paragraph but not upon both.

Leonard v. City of Terre Haute, 104, 110 (3), 114 (3).

4. *Fire Chief.—Salary.—Answer.*—In an action by a chief of the fire department of a city of the third class for salary as chief and also as a fireman, answers alleging that the plaintiff surrendered and abandoned the position as fire chief and as a fireman are sufficient on demurrer, since they constitute argumentative denials.

Leonard v. City of Terre Haute, 104, 114 (5).

5. *Firemen.—Salary.—Performance of Duty.*—The statute makes provision for the appointment, compensation and removal of city firemen, and since their duties are of a public nature they are so far official that either a chief or a fireman is entitled to his salary as an incident to the position, whether he performs the duties of such position or not.

Leonard v. City of Terre Haute, 104, 114 (7).

- 5a. *Firemen.—Salaries.—Evidence.*—Evidence that the plaintiff was a fire chief in a city of the third class, that the board of safety appointed another, that plaintiff introduced the new appointee and asked to be assigned to duty under him and that he was never so assigned, does not support a verdict for defendant, where one paragraph of complaint alleged that plaintiff was a fire chief and that such board discharged him for political reasons only, and another alleged that he was a fireman and had never been discharged.

Leonard v. City of Terre Haute, 104, 115 (9).

6. *Street Improvements.—Assessments.—Appeal.*—Under §8714 Burns 1908, Acts 1905 p. 219, §109, providing that "the question of special benefits shall be deemed conclusively determined by and in the proceedings before the board of public works," and §8716 Burns 1908, Acts 1905 p. 219, §111, providing that if the owner of any lot shall petition the circuit court within ten days from the completion of the assessment roll, the court shall appoint three appraisers whose report "shall be final and conclusive," no appeal lies from the assessment so made, and a defendant in a foreclosure suit cannot, therefore, contest the amount of his assessment.

Farnham v. Schneider, 509, 510 (1), 511 (1).

7. *Street Assessments.—Statutes.—Amendments.—Saving Clauses.*—Section four of the act of 1909 (Acts 1909 p. 412) providing that any aggrieved lot owner may appeal to the circuit court from his assessment, repeals that part of §8716 Burns 1908, Acts 1905

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p. 219, §111, providing for the appointment by the court of appraisers to reassess the benefits; and as there is no saving clause to such act of 1909, the court is powerless to proceed under such §8716 with a petition theretofore filed in accordance therewith.

Holderman v. Town of North Manchester, 491, 493 (1).

8. *Street Assessments.—Petition to Appoint Appraisers.—Appeal.*—The rights and remedies in street improvement proceedings are entirely statutory; and a petition, under §8716 Burns 1908, Acts 1905 p. 219, §111, for the court to appoint appraisers to reassess the benefits to petitioner's lot, does not constitute an appeal to the circuit court; and the court is without jurisdiction to hear judicially any matter connected with such assessment.

Holderman v. Town of North Manchester, 491, 494 (2).

9. *Street Assessments.—Conclusiveness of.—Appeal.*—No appeal lies from a street assessment made pursuant to §8716 Burns 1908, Acts 1905 p. 219, §111, providing that the boards of public works shall assess the abutting lots for the cost of street improvements, and that if the owner of any lot is aggrieved he may petition the circuit court for the appointment of appraisers, whose report shall be "final and conclusive."

Holderman v. Town of North Manchester, 491, 494 (3).

10. *Street Improvement Assessments.—Waiver.—Personal Liability.*—A waiver executed by a frontager cuts off his right to make a defense to a street improvement assessment for anything appearing or omitted in the assessment proceedings, and makes him personally responsible for the deficit of cost and interest existing after the sale of the assessed lot on foreclosure of the lien.

Gubbins v. Harrington, 488, 490 (1).

11. *Street Improvement Assessments.—Foreclosure.—Complaint.—Conditions Precedent.—Abatement.*—A complaint to foreclose a street improvement lien that fails to allege the giving of the requisite notice to defendant to pay the amount due, is bad both as to the enforcement of the lien and as to the securing of a personal judgment.

Gubbins v. Harrington, 488, 490 (2).

12. *Street Improvement Assessments.—Statutes.—Contracts.*—Street improvement liens are statutory; and the remedy for enforcing them may be altered by the legislature at any time before contract rights intervene.

Gubbins v. Harrington, 488, 490 (3).

13. *Street Improvement Assessments.—Liens.—Foreclosure.—Notice.—Abatement.*—Under §8721 Burns 1908, Acts 1907 p. 550, §3, providing that no person who has filed a waiver in a street improvement proceeding shall be sued unless "served with fifteen days' personal written notice of such delinquency," a suit filed without the giving of such notice may be abated.

Gubbins v. Harrington, 488, 491 (4).

14. *Street-Improvement Liens.—Priority.—Statutes.*—Under §3623f Burns 1901, Acts 1901 p. 534, §6, providing that street-improvement "assessments, as made, shall be a lien upon the several lots, tracts of land and parcels of ground to the same extent that taxes are a lien upon such property, and shall be collectible in the same way that taxes are collected," the liens of two or more street-improvement assessments are equal, though such improvements are made at different times.

Brownell Improv. Co. v. Nixon, 195, 199 (2), 200 (2), 201 (2), 210 (2).

MUNICIPAL CORPORATIONS—Continued.

15. *Taxation.—“Taxes.”—“Assessments.”—Statutes.*—The words “taxes” and “assessments” as used in §3623f Burns 1901, Acts 1901 p. 534, §6, providing that “the assessments [for street improvements] * * * shall be a lien upon the several lots, * * * to the same extent that taxes are a lien upon such property,” import, respectively, a charge levied upon the person or property for the support of the government, and a special imposition placed upon property to pay for a public improvement.
Brownell Improv. Co. v. Nixon, 195, 201 (4).
16. *Street-Improvement Liens.—Enforcement.—Basis of Suit.—Collateral Attack.*—In a suit to foreclose street-improvement liens, the assessments made constitute the basis of the suit; and a defense that the contract for such improvement, and the assessments made, were void, constitutes a collateral attack on the judgment of the council in making them.
Brownell Improv. Co. v. Nixon, 195, 204 (5).
17. *Street Improvements.—Assessments.—Jurisdiction.—Statutes.*—The right of a municipal corporation to assess property for the making of street improvements is statutory; and the statutory method of obtaining jurisdiction to make such assessments is mandatory and must be substantially complied with.
Brownell Improv. Co. v. Nixon, 195, 204 (6).
18. *Street-Improvement Assessments.—Void.—Collateral Attack.*—Where a city council, having no jurisdiction thereof, makes assessments for street improvements, its action is void; and if such want of jurisdiction appears upon the face of its proceedings, the validity thereof may be questioned on a collateral attack.
Brownell Improv. Co. v. Nixon, 195, 205 (7).
19. *Street-Improvement Assessments.—Jurisdiction.—Notice.*—Where a frontager's name, in a street-improvement proceeding, was omitted from the notice given by the city clerk of the meeting of the city commissioners, as required by §3623c Burns 1901, Acts 1901 p. 534, §3, but notice by publication was given as required by §3623d Burns 1901, Acts 1901 p. 534, §4, setting forth the location and terminal points of the improvement, the date of filing the commissioners' report, and the time of the meeting of the council to consider such assessments, inviting all persons interested to appear, the council had jurisdiction of the matter, and an assessment so confirmed by the council is valid.
Brownell Improv. Co. v. Nixon, 195, 205 (8).
20. *Street-Improvement Assessments.—Jurisdiction of Council.*—The common councils of cities have exclusive original jurisdiction of the subject-matter of street-improvement assessments, and in the exercise thereof they act in an administrative capacity until notice is given, and property owners appear for the final adjustment of assessments, when their action is *quasi-judicial*.
Brownell Improv. Co. v. Nixon, 195, 206 (9).
21. *Street Improvements.—Notice to Bidders.*—Under §3623a Burns 1901, Acts 1901 p. 534, §1, providing that “when the common council of any city * * * desires to make any street * * * improvement, it shall * * * fix a date upon which bids will be received,” and “shall give notice of the letting of such contract,” the common council cannot, in the absence of notice to the bidders, let a contract for such improvement.
Brownell Improv. Co. v. Nixon, 195, 206 (10).

MUNICIPAL CORPORATIONS—Continued.

22. *Street Improvements.—Jurisdiction.—Presumptions.*—Where a common council has jurisdiction to order the making of street improvements, such jurisdiction is presumed to continue, unless, upon the face of the council's proceedings, it appears to have been lost.
Brownell Improv. Co. v. Nixon, 195, 207 (11).
23. *Street Improvements.—Plans.—Notice.—Special Findings.*—In a suit for the foreclosure of a street-improvement lien, special findings that the resolution of the council for the making of such improvement conformed to the statutory requirements (§3623a Burns 1901, Acts 1901 p. 534, §1), that the notice to bidders referred to plans and specifications on file with the city clerk, but failing to show that the plans and specifications referred to in the notice were a part of the resolution, and that the council changed the plans and specifications on file with the clerk after the bids were received, do not show a loss of jurisdiction, since the change of the plans on file with the clerk might have been made to conform to the resolution of the council.
Brownell Improv. Co. v. Nixon, 195, 207 (12).
24. *Street Improvements.—Notice.—Estoppel.*—Where some notice of a street improvement is given and the council holds it sufficient, frontagers who know of the street improvement and who stand by without objection until the work is completed are estopped to question the validity of the notice or the jurisdiction of the council to order such improvement.
Brownell Improv. Co. v. Nixon, 195, 208 (13).
25. *Street-Improvement Liens.—Equity.*—Suits to foreclose street-improvement liens are of equitable cognizance.
Brownell Improv. Co. v. Nixon, 195, 208 (14), 210 (14).
26. *Street Improvements.—Notice.—Estoppel.—Special Findings.*—While it is true that a subsequent purchaser of a lot assessed for street improvements who knew of the making of such improvements would not be estopped to contest the validity of the notice of the improvements where the owner did not know of the making of such improvements, yet where the special findings show that the owner was present when the council awarded the contract for the improvements, and that three times a week he visited his daughter, who lived on the street where the improvements were being made, notice is sufficiently shown.
Brownell Improv. Co. v. Nixon, 195, 211 (15).
27. *Streets.—Defective Gutters.—Jury.*—Whether a gutter along a street, twenty-eight inches deep, and so situated that a pedestrian in the night might fall therein while passing along the street, was dangerous to pedestrians, is a question for the jury.
City of Indianapolis v. Schoenig, 76, 78 (3).
28. *Streets.—Defects.—Evidence.—Question for Jury.*—Where the evidence in reference to an alleged defect in a street is without conflict, but reasonable men might differ as to whether such defect constituted a dangerous one, the question thereof is one for the jury.
City of Indianapolis v. Schoenig, 76, 80 (4).
29. *Streets.—Gutters.—Guards.*—It is the duty of a city in the construction of its streets to make the traveled way thereof and adjacent places reasonably safe for travel, and a failure therein renders it liable to one injured thereby.
City of Indianapolis v. Schoenig, 76, 80 (6).

MUNICIPAL CORPORATIONS—Continued.

30. *Streets.—Defects.—Contributory Negligence.—Care.*—A pedestrian who walks diagonally across a street instead of going straight across from sidewalk to sidewalk is not guilty of contributory negligence as a matter of law, such pedestrian being required to use care commensurate with the known danger; but where he is ignorant of the defect in the street that caused his injury, he may assume that the street is reasonably safe for travel.
City of Indianapolis v. Schoenig, 76, 81 (7).
31. *Streets.—Care Required.—Frequency of Use.*—Municipal corporations are not insurers of the safety of their streets and sidewalks, but are required to exercise ordinary care to keep them in a reasonably safe condition for travel; and ordinary care varies with the frequency of the use of the streets.
City of Huntington v. Bartrom, 117, 121 (4).
32. *Negligence.—Streets.—Defective Sidewalks.—Infants.*—A child seven years old is not *sui juris*, nor guilty of contributory negligence, as a matter of law, in failing to avoid stumbling over a stone projecting three-fourths of an inch above the sidewalk, and in any event, a general verdict in its favor is conclusive as to both questions.
City of Huntington v. Bartrom, 117, 119 (1).
33. *Defective Sidewalks.—Negligence.*—A city is not guilty of negligence in constructing and maintaining, in a sparsely settled part thereof, a sidewalk with a stone projecting above the surface thereof three-fourths of an inch and which stone is two inches in diameter but slopes from the top to the surface of the sidewalk.
City of Huntington v. Bartrom, 117, 120 (2), 121 (2), 123 (2).
34. *Negligence.—Action.*—In the absence of negligence, no action lies against a city on account of injuries occasioned by a defective sidewalk.
City of Huntington v. Bartrom, 117, 121 (3).
35. *Liability for Negligence.*—Cities have no statutory liability for defects and dangers in streets, but they are liable for negligence in the maintenance thereof.
City of Indianapolis v. Slider, 38, 41 (1).
36. *Streets.—Dead Trees.—Negligence.—Complaint.*—A complaint alleging that defendant city “authorized, permitted, and negligently allowed a dead, rotten and decayed tree to stand * * * between the sidewalk and roadway of said [Pennsylvania] street * * * four weeks after it had notice of its dangerous condition * * * without placing around it, or at it, any safeguards or railings to give notice of its dangerous character * * *; that the plaintiff * * * was lawfully walking upon said sidewalk, and without any notice of the dead, rotten and decayed character of said tree, or its dangerous nature * * * and in the use of all due care, when said dead, rotten and decayed tree fell with great force and violence upon” her, to her damage, is bad, since it fails to show that the tree fell because it was dead, rotten and decayed.
City of Indianapolis v. Slider, 38, 42 (6).

“MUST”—

See WORDS AND PHRASES.

MUTUAL BENEFIT SOCIETIES—

See INSURANCE.

NEGLIGENCE—

See CARRIERS; CORPORATIONS; DAMAGES; MASTER AND SERVANT; RAILROADS; TELEGRAPHS AND TELEPHONES.

1. *Concurrent.—Liability.*—Where plaintiff's injuries were caused by the concurrent or successive negligence of two or more persons, one of such persons, when sued alone, cannot escape liability on the ground that the results of the injuries from others cannot be apportioned under the evidence.
Sherman v. Indianapolis Traction, etc., Co., 623, 629 (4).
2. *Proximate Cause.—What is.*—The proximate cause of an injury or death is the decisive cause.
Cumberland Tel., etc., Co. v. Kranz, 67, 74 (9).
Peru Heating Co. v. Lenhart, 319, 329 (5).
3. *Proximate Cause.*—The proximate cause of an injury is the decisive cause; and it may consist in omission as well as commission.
Republic Iron, etc., Co. v. Lulu, 271, 277 (3).
4. *Proximate Cause.—Question of Law or Fact.*—Where the facts are undisputed, what is the proximate cause of an injury is a question of law. *Cumberland Tel., etc., Co. v. Kranz*, 67, 73 (3).
5. *Proximate Cause.*—Negligence to be actionable must be the proximate cause of the injury complained of.
City of Indianapolis v. Slider, 38, 41 (2).
6. *Proximate Cause.—Definition.*—The proximate cause of an injury is that cause which in a natural and continuous sequence, unbroken by any new, independent cause, produces the injury, and without which the injury would not have happened.
City of Indianapolis v. Slider, 38, 42 (3).
7. *Complaint.—Essentials.*—A complaint cannot be aided by other parts of the record, must contain every material fact, must not be equivocal and must show that the acts complained of were the proximate cause of the injuries sustained.
Chicago, etc., R. Co. v. Coon, 675, 679 (1).
8. *Wilful Injuries.—Complaint.*—A single paragraph of complaint cannot combine a negligent injury with a wilful one, such torts being inconsistent; and where both are alleged the court must determine from the language used which was really intended.
Barrett v. Cleveland, etc., R. Co., 668, 671 (2).
9. *Contributory.—Negating.—Complaint.*—Since 1899 (Acts 1899 p. 58, §362 Burns 1908) it is not necessary, in a complaint for personal injuries, to negative contributory negligence, a complaint, otherwise good, being sufficient where it does not affirmatively show such negligence.
Fort Wayne Traction, etc., Co. v. Miller, 633, 638 (2).
10. *Elements.—Knowledge.—Complaint.*—A complaint for negligence must allege facts showing a duty owing to plaintiff from defendant, and that the defendant had knowledge thereof.
Barrett v. Cleveland, etc., R. Co., 668, 673 (4).
11. *Complaint.*—A complaint for negligence is bad where it fails to connect the injury with the negligence.
City of Indianapolis v. Slider, 38, 43 (7).
12. *Heating Companies.—Turning Off Heat.—Freezing.—Flooding.—Damages.—Proximate Cause.—Complaint.*—A complaint by tenants of the first floor of a building, alleging that the defendant landlord had such building piped for hot-water heat, that defendant heating company contracted with tenants of the second floor to furnish heat to them, that such tenants afterward noti-

NEGLIGENCE—Continued.

- fied such landlord and such company that they did not longer desire such heat, that such defendants so negligently turned off such heat that the pipes froze and burst, damaging the plaintiffs' goods on the first floor, states a cause of action against both defendants, and sufficiently shows that their negligence was the proximate cause of the damages.
Peru Heating Co. v. Lenhart, 319, 326 (3), 328 (3), 330 (3).
13. *Contributory.—Burden of Pleading and Proving.*—The burden of proving contributory negligence rests upon the defendant (§362 Burns 1908, Acts 1899 p. 58).
Chicago, etc., R. Co. v. Ginther, 12, 13 (1), 19 (1), 20 (1).
Winona, etc., R. Co. v. Rousseau, 248, 250 (1).
14. *Contributory.—Negating.—Complaint.*—Since 1899 (Acts 1899 p. 58, §362 Burns 1908) a complaint for negligence need not negative contributory negligence.
Chicago, etc., R. Co. v. Coon, 675, 682 (4).
15. *Contributory.—Burden of Proof.—Destruction of Property.*—In actions for the destruction of property by negligence, the burden of proving freedom from contributory negligence is on the plaintiff.
Cumberland Tel., etc., Co. v. Kranz, 67, 75 (10).
16. *Contributory.—Burden of Proof.*—Contributory negligence constitutes a defense; and the burden is on defendant to prove such defense by a preponderance of the evidence.
Harmon v. Foran, 262, 269 (8).
17. *Evidence.—Inferences.—Appeal.*—In a negligence case, evidence of facts from which an inference of defendant's negligence arises, is sufficient to sustain a verdict, on appeal.
Winona, etc., R. Co. v. Rousseau, 248, 259 (11).
18. *Question of Law or Fact.*—Negligence is sometimes a question of fact, sometimes a question of law, and sometimes a mixed question of law and fact; but where the facts are undisputed, or where a special finding is made, negligence becomes a question of law.
Cumberland Tel., etc., Co. v. Kranz, 67, 73 (2).
19. *Proximate Cause.—Contributory Negligence.*—Where plaintiff shows that defendant's negligence was the proximate cause of the death of his two horses, and that plaintiff did not contribute thereto, he is entitled to recover.
Cumberland Tel., etc., Co. v. Kranz, 67, 76 (12).
20. *Evidence.—Subsequent Repairs.*—In an action for negligence caused by defects, evidence of defendant's subsequent repair of such defects is not admissible. *Harrod v. Bisson*, 549, 555 (2).
21. *Several Acts.—Proof of One.*—Where several acts of negligence are alleged in the complaint, proof of one is sufficient.
Chicago, etc., R. Co. v. Coon, 675, 684 (8).
22. *Joint Tort Feasors.—Verdict.—Favorable to One and Against the Other.—Interrogatories.*—Where joint tort feasors are sued and there is a general verdict against one thereof, and in favor of the other, but answers to the interrogatories show that both were liable, the court should render judgment on the answers to the interrogatories against the other, the amount assessed in the verdict against the one governing as to both.
Peru Heating Co. v. Lenhart, 319, 335 (11).
23. *Contributory.—Freedom from.—Special Findings.—Telephone Wires.—Driving Over.*—Special findings that defendant telephone company's broken wire, heavily charged with electricity, was

NEGLIGENCE—Continued.

lying upon the ground, which was covered with grass and weeds tending to obscure the wire, and that plaintiff's servant who was competent, and who, in a careful manner, drove plaintiff's team upon it, both horses being killed, sufficiently show freedom from contributory negligence.

Cumberland Tel., etc., Co. v. Kranz, 67, 75 (11).

NEW TRIAL—

Failure of evidence to support complaint must be made ground for, see **APPEAL 5**; *City of Indianapolis v. Schoenig*, 76, 78 (2).

1. *Complaint.—Exhibits.—Foreign Affidavits.—Authentication.*—An affidavit, certified to by an officer of a sister state and attached as an exhibit to a complaint for a new trial on the ground of newly-discovered evidence, after the term, cannot be considered as a part thereof where it is not authenticated as required by §498 Burns 1908, §475 R. S. 1881, providing that "when any affidavit is taken in another state, and certified by the officer or justice of the peace taking the same, under his hand and seal of office, if he have any such seal, and attested by the clerk of the circuit or district court, or court of common pleas of the county where such officer exercises the duties of his office, under the hand of the clerk and seal of his court, the clerk also certifying that the officer or justice of the peace is, by the laws of said state, duly empowered to administer oaths * * * such affidavit shall be deemed sufficiently authenticated."

First Nat. Bank v. Mulford, 84, 87 (1).

2. *Newly-Discovered Evidence.—How Shown.—Complaint.*—A verified complaint for a new trial on the ground of newly-discovered evidence, after the term, setting out the name of the witness relied upon and the facts to which he will testify, sufficiently shows such newly-discovered evidence without an exhibit setting out the authenticated affidavit of the witness.

First Nat. Bank v. Mulford, 84, 88 (2).

3. *Action for.—Newly-Discovered Evidence.—Procedure.*—The procedure in an action for a new trial on the ground of newly-discovered evidence, after the term, is similar in pleading and proof to any other civil action.

First Nat. Bank v. Mulford, 84, 89 (4).

4. *Newly-Discovered Evidence.—Diligence.—Complaint.*—A complaint for a new trial, after term, on the ground of newly-discovered evidence, must set out the facts showing the requisite diligence to discover such evidence before the trial.

First Nat. Bank v. Mulford, 84, 90 (5).

5. *Newly-Discovered Evidence.—Diligence.—Absent Witness.—Complaint.*—A complaint for a new trial, after the term, on the ground of newly-discovered evidence, alleging that the witness whose testimony was relied upon as a basis for securing such new trial was a defaulter and had absconded on August 8, 1907, and that from that time until his arrest, on April 28, 1908, appellant made diligent search for him in all parts of the world, but could not find him, shows sufficient diligence up to the time of the arrest, but not afterwards; and as neither the complaint nor the judgment sets out the date of the trial, the complaint is insufficient to show proper diligence before such trial.

First Nat. Bank v. Mulford, 84, 90 (6).

6. *Grounds.—Special Findings.*—Questions relating to the special findings in a case cannot properly be made grounds for a new trial. *Independent Torpedo Co. v. J. E. Clark Oil Co.*, 124, 125 (1).

NEW TRIAL—Continued.

7. *Newly-Discovered Evidence.—Cumulative.—Diligence.*—A new trial on the ground of newly-discovered evidence will not be granted, where such evidence would be merely cumulative, or where the only diligence shown to secure such evidence before the trial was to make a general and indefinite inquiry of a witness as to whether he knew anything about the case, to which the witness answered that he knew nothing.
Poer v. Johnson, 596, 698 (3).
8. *Excessive Recovery.*—Where the judgment rendered is too large, giving the plaintiff a larger amount than is warranted by the evidence, a motion for a new trial on that ground should be sustained.
Shutt v. Smith, 160, 161 (3).
9. *Joint Assignments.—New Trial.—Instructions.*—Where instructions are jointly challenged in a motion for a new trial, the assignment is unavailing unless they are all bad.
Chicago, etc., R. Co. v. Coon, 675, 687 (11), 688 (11).
10. *Grounds.—Receiving Separate Verdicts Against Joint and Several Defendants.*—In a joint and several action of tort against two or more defendants, the receiving of separate verdicts against such defendants does not constitute ground for a new trial.
Perley v. Schmidt Cut Stone Co., 344, 347 (3).
11. *As of Right.—Joining Causes Where New Trial is Not Demandable.*—Where a complaint consists of two or more paragraphs, on one of which a new trial as of right is demandable, and on the other it is not, a new trial as of right should not be granted, where the judgment rests upon both, even though a cross-complaint was filed to quiet title.
Norris v. Kendall, 304, 306 (1).
12. *Statutory.—Annuling Title.*—In a suit to annul and cancel a deed procured by imposition and unfair means, a new trial as of right is demandable.
Norris v. Kendall, 304, 306 (2), 308 (2).
13. *Statutory.*—The statute granting a new trial as a matter of right (§1110 Burns 1908, §1064 R. S. 1881), is mandatory.
Norris v. Kendall, 304, 308 (4).
14. *Statutory.—When Demandable.—How Determined.*—Whether a new trial as a matter of right is demandable in a given case is determined by a consideration of the issues therein prosecuted to final judgment.
Thomas v. McCoy, 403, 404 (1).
15. *Statutory.—Easements.*—In a suit to confirm a right of way as of necessity a new trial as a matter of right is demandable.
Thomas v. McCoy, 403, 406 (5).
16. *Motion for New Trial.—Newly-Discovered Evidence.*—In determining the sufficiency of a motion for a new trial on the ground of newly-discovered evidence, the court can look only to the facts set out in affidavits on file. *First Nat. Bank v. Mulford*, 84, 89 (3).

NOTICE—

See DRAINS; **VENDOR AND PURCHASER** 14.

Of interstate commerce rates is presumed, see **COMMERCE** 4; *Baltimore, etc., R. Co. v. New Albany Box, etc., Co.*, 647, 654 (4).

Of natural laws of freezing, see **CORPORATIONS**.

Condition precedent to suit to foreclose street assessment, see **MUNICIPAL CORPORATIONS** 13; *Gubbins v. Harrington*, 488, 491 (4).

Of street assessments, see **MUNICIPAL CORPORATIONS**.

As affecting reformation, see **REFORMATION**.

Recording of deed constitutes, see **VENDOR AND PURCHASER**.

NUISANCE—

In use of electricity, see RAILROADS.

1. *Use of Property.—Incidental Damage.—Maxims.*—Though the maxim "*sic utere tuo ut alienum non laedas*" expresses a well-settled rule of law, it must be limited in its broad statement so as not to include the damages incident to the proper use of property, expressed in the words "*damnum absque injuria*."
Lake Shore, etc., R. Co. v. Chicago, etc., R. Co., 584, 586 (1).
2. *Definition.—Statutes.*—"Whatever is injurious to health, or indecent, or offensive to the senses, or an obstruction to the free use of property, so as essentially to interfere with the comfortable enjoyment of life or property," constitutes the statutory definition of a nuisance (§291 Burns 1908, §289 R. S. 1881); and it is for the courts to determine whether the particular facts bring the case within the statute.
Lake Shore, etc., R. Co. v. Chicago, etc., R. Co., 584, 588 (2).
3. *Trespass.—Overflowing Mineral Waters.—Damages.*—The operator of a gas well or oil well, who suffers salt water therefrom to overflow his neighbor's land, destroying its fertility and the vegetation thereon, is liable therefor.
Niagara Oil Co. v. Jackson, 238, 241 (2).
4. *Contributory Negligence.*—Contributory negligence constitutes no defense to an action for maintaining a nuisance.
Niagara Oil Co. v. Jackson, 238, 244 (5).
5. *Negligence.—Discharging Collected Waters.—Complaint.*—A complaint alleging that defendant in operating its oil and gas well discharged saline waters upon plaintiff's land, thereby destroying its fertility and vegetation, states a cause of action regardless of any allegations of negligence therein contained.
Niagara Oil Co. v. Jackson, 238, 245 (6).
6. *Continuance of.—Damages.*—A nuisance constitutes a continuing offense and gives rise to damages in plaintiff's favor as long as it continues.
Niagara Oil Co. v. Jackson, 238, 246 (9).
7. *Damages.—For What Time Assessed.—Supplemental Complaint.*—Ordinarily damages can be awarded only to the time of the commencement of an action, but in an action for nuisance a supplemental complaint may be filed for damages accruing after the filing of the complaint, and in that way damages may be recovered up to the time of the trial.
Niagara Oil Co. v. Jackson, 238, 247 (10).

OFFICERS—

See MUNICIPAL CORPORATIONS.

1. *De Facto.—De Jure.—Salaries.—Quo Warranto.*—Where a *de facto* officer is in possession and performing the duties of an office, the *de jure* officer, to recover the salary, must first establish his right to such office by a *quo warranto* proceeding.
Leonard v. City of Terre Haute, 104, 112 (4).
2. *Salary.—Performance of Duty.*—The salary of an official position belongs to the officer as an incident to the office and does not depend upon the performance of the duties of such office.
Leonard v. City of Terre Haute, 104, 114 (6).

OPINIONS—

See EVIDENCE.

OVERRULED CASES—

See CASES.

PARENT AND CHILD—

See INFANTS; WORK AND LABOR.

Inheritance by adopted children, see DESCENT AND DISTRIBUTION.

Adopted Children.—Statutes.—Construction.—The statutes providing for the adopting of children should be construed so as to establish reciprocal relations between such adopting parents and the adopted children, the purpose being to make the legal status of such children the same as if they were the real children of such parents. *Dunn v. Means*, 383, 387 (1).

PARTIES—

See APPEAL; DRAINS; PLEADING.

Additional, on Change of Venue.—A plaintiff, after a change of venue from the county has been granted, may amend his complaint by adding new parties, though such parties live in the county from which the case was taken.

Niagara Oil Co. v. Jackson, 238, 246 (8).

PARTITION—

See EASEMENTS.

Quieting Title.—Complaint.—Cross-Complaint.—A suit to quiet title to alleged interests in certain lands and for partition necessarily assails defendant's claim of title to the whole thereof; and she may assert her title in a cross-complaint and have all matters of title litigated in the one suit. *Kraus v. Thomas*, 437, 440 (2).

PARTNERSHIP—

See SET-OFF AND COUNTERCLAIM.

PAYMENT—

Evidence of, see WORK AND LABOR.

PENALTIES—

See CONTRACTS 27.

PHYSICIANS—

Actions against, for malpractice, see LIMITATION OF ACTIONS.

1. *Malpractice.—Evidence.—Cross-Examination.—Fraudulent Conveyance of Property to Escape Judgment.*—In an action against a physician for malpractice, the defendant may be asked on cross-examination whether, just before, or after, the action was brought, he had conveyed his real estate to his wife, such defendant having testified that he had not been negligent in his treatment. *Miller v. Dill*, 149 Ind. 326, distinguished.

Harrod v. Bisson, 549, 551 (1).

2. *Malpractice.—Evidence.—Opinions.*—In an action against defendant for malpractice, the testimony of a physician that the bones of the maimed hand in question were in the same relationship on the day of the trial as at the time the hand was dressed, is not harmful on the ground that he had not given the facts on which his conclusion was based, where he had testified fully theretofore as to the condition of such hand, it being fairly presumed that his opinion was based on his statement thereof.

Harrod v. Bisson, 549, 556 (3), 557 (3).

PLEA IN ABATEMENT—

See PLEADING.

PLEADING.

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| I. FORM AND ALLEGATIONS, 1. | V. AMENDED AND SUPPLEMENTAL PLEADINGS, 20-24. |
| II. COMPLAINT, 2-8. | VI. MOTIONS, 25-29. |
| III. ANSWER AND CROSS-COMPLAINT, 9, 10. | VII. ISSUES, PROOF, VARIANCE, 30. |
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See ACCORD AND SATISFACTION; BILLS AND NOTES; SET-OFF AND COUNTERCLAIM.

I. FORM AND ALLEGATIONS.

In justices' courts, see JUSTICES OF THE PEACE.

Presumption that lease was oral, where not alleged to be in writing, see LANDLORD AND TENANT 4; *Wah Kee v. Clark*, 462, 463 (1).

1. *Allegations.—How Considered.*—A pleading is presumed to contain all the facts in the party's favor.

Lake Shore, etc., R. Co. v. Chicago, etc., R. Co., 584, 588 (4)

II. COMPLAINT.

Complaint for goods sold, see ACCOUNTS; *Pennsylvania, etc., Sup. Co. v. Fosnotte*, 166, 168 (2).

Complaints against carriers, see CARRIERS.

Complaint for commission on sales of real estate, see CONTRACTS 18; *Wellington v. Crawford*, 173, 174 (1), 177 (1).

Complaints for breach of contracts, see CONTRACTS 20, 21.

Complaint by township for recovery of stock, see CORPORATIONS 3, 4.

Complaint to declare void a drainage assessment, see DRAINS 6; *Brett v. Pretorious*, 527, 530 (2).

Complaint to establish right of way, see EASEMENTS 1; *Thomas v. McCoy*, 403, 404 (2).

Allegation in complaint that person is of unsound mind, not a conclusion, see FRAUDULENT CONVEYANCES 3; *Humphrey v. Mottier*, 469, 473 (3).

Complaint to set aside deed, see FRAUDULENT CONVEYANCES 4; *Humphrey v. Mottier*, 470, 475 (4).

Complaint to prevent interurban railroad company from using electricity, see INJUNCTION 1.

Complaint to compel railroad company to build certain kind of fence, see INJUNCTION 2; *Cincinnati, etc., Railroad v. Wall*, 605, 608 (3).

Complaints on insurance policies, see INSURANCE 15, 16.

Complaint for possession, see LANDLORD AND TENANT 4; *Wah Kee v. Clark*, 462, 463 (1).

Complaints for injuries to servants, see MASTER AND SERVANT 8-12.

Complaint by fire chief for salary, see MUNICIPAL CORPORATIONS 3.

Complaint to foreclose street assessments, see MUNICIPAL CORPORATIONS 11; *Gubbins v. Harrington*, 488, 490 (2).

Complaint for injuries received from the fall of a dead tree, see MUNICIPAL CORPORATIONS 36; *City of Indianapolis v. Slider*, 38, 42 (6).

Complaints for negligence, see NEGLIGENCE 7-14.

Complaint for new trial, see NEW TRIAL.

PLEADING—Continued.

Complaint for nuisance, see **NUISANCE**.

Complaint and cross-complaint for partition, see **PARTITION**.

Complaints to quiet title, see **QUIETING TITLE**.

Complaint for damages for destroying drains, see **RAILROADS** 2, 3.

Complaints in railroad cases, see **RAILROADS**.

Complaint to reform deed, see **REFORMATION**.

Complaint for discrimination, see **TELEGRAPHS AND TELEPHONES** 7.

Complaint for subrogation, see **VENDOR AND PURCHASER** 11.

Complaint for services, see **WORK AND LABOR**.

2. *Evidence.—Judicial Notice.*—A complaint alleging that animals were sold at a stockyard sufficiently shows that they were sold at the market price, since courts judicially know that the sale of animals at such places determine the market price.

Wallace v. Coons, 511, 517 (4).

3. *Sufficiency.—Initial Attack on Appeal.*—A complaint attacked for the first time on appeal is sufficient if the facts alleged will bar another action for the same cause.

Pennsylvania, etc., Sup. Co. v. Fosnotte, 166, 168 (1).

4. *Sufficiency.*—A complaint stating the facts constituting the cause of action in plain and concise language and in such a manner as to enable a person of common understanding to know what is intended, is sufficient.

Pennsylvania, etc., Sup. Co. v. Fosnotte, 166, 168 (3).

5. *Certainty.*—The same certainty in a complaint is required by the code, as by the common law; and a plaintiff will be presumed to state his cause of action as strongly as the facts warrant.

City of Indianapolis v. Slider, 38, 42 (5).

6. *Repetitions.*—A complaint alleging the facts constituting the cause of action in such a manner as to enable a person of common understanding to know what is intended, is sufficient as against a demurrer, though it contains many vain repetitions.

Harvey v. Hand, 392, 395 (2).

7. *Sufficiency.*—A complaint that entitles the plaintiff to any part of the relief prayed for is sufficient on demurrer.

Harvey v. Hand, 392, 396 (3).

Straus v. Yeager, 448, 457 (8).

8. *Construction.*—A complaint should be liberally construed with a view of giving substantial justice to the parties.

Republic Iron, etc., Co. v. Lulu, 271, 277 (4).

III. ANSWER AND CROSS-COMPLAINT.

Answers in action on notes, see **BILLS AND NOTES**.

Answer of agent's want of authority, see **CONTRACTS** 22.

Partial answer addressed to entire complaint, bad, see **FRAUDULENT CONVEYANCES** 1; *McKnight v. Kinsley*, 372, 376 (2).

Answers in actions for possession, see **LANDLORD AND TENANT** 5, 6.

Answer, in action by fire chief for salary, see **MUNICIPAL CORPORATIONS** 4; *Leonard v. City of Terre Haute*, 104, 114 (5).

Answer in suit for subrogation, see **SUBROGATION**.

Answer in action for discrimination, see **TELEGRAPHS AND TELEPHONES** 8.

PLEADING—Continued.

Cross-complaint to quiet title, see **QUIETING TITLE 1**; *Kraus v. Thomas*, 437, 441 (3).

9. *Plea in Abatement.—How Questioned on Appeal.*—A plea in abatement can be questioned on appeal only where a demurrer is filed thereto and exceptions reserved to the ruling thereon.

Eppert v. Gardner, 188, 191 (2).

10. *Answer.—Theory.*—A paragraph of answer must proceed upon some definite theory apparent from the general scope and character thereof; and upon such theory it must stand or fall.

Reeves & Co. v. Miller, 339, 344 (3).

IV. DEMURRER.

11. *Answer.—Demurrer to.—Form.*—A demurrer to a paragraph of answer on the ground that such paragraph "does not state facts sufficient to constitute an answer in said cause," presents no question.

Malon v. Scholler, 691, 693 (1).

12. *Insufficient Complaint.—Defective Answer.*—Where a complaint is bad, the overruling of a demurrer to a bad paragraph of answer, is not prejudicial.

Barrett v. Cleveland, etc., R. Co., 668, 671 (1).

13. *Reply.—Overruling Demurrer to.—When Harmless.*—The alleged erroneous overruling of a demurrer to a paragraph of reply is harmless, where the judgment was not affected by any evidence admitted thereunder.

Humphrey v. Mottier, 469, 475 (5).

14. *Overruling Demurrer to Insufficient Paragraph of Answer.—Appeal.*—The overruling of a demurrer to an insufficient paragraph of answer constitutes reversible error, where the finding for defendant was general; and the court on appeal will not examine the evidence to determine whether such ruling was harmless. *McFadden v. Schroeder*, 9 Ind. App. 49, overruled.

Gregory v. Arms, 562, 577 (17), 578 (17), 582 (17).

15. *Complaint.—Sufficiency.—Special Findings.—Conclusions of Law.*—The overruling of a demurrer to a complaint need not be considered on appeal, where the exceptions to the conclusions of law upon the special findings present the same questions.

Timmonds v. Taylor, 531, 533 (1).

16. *Paragraphs of Answer.—Facts Provable Under Another.*—It is harmless error to sustain a demurrer to a paragraph of answer, where the facts therein alleged are provable under another paragraph.

Malon v. Scholler, 691, 693 (2).

17. *Amended Complaint.*—A demurrer filed after the filing of an amended complaint will be deemed as addressed to such amended complaint, the original complaint being out of the record.

Cincinnati, etc., Railroad v. Wall, 605, 608 (2).

18. *Want of Facts.—Defective Parties.*—A demurrer for want of facts does not raise the question of a defect of parties.

Vernon, etc., R. Co. v. Washington Tp., 309, 313 (2).

19. *Defect of Parties.*—A demurrer for defect of parties must set out the names of the proper parties.

Vernon, etc., R. Co. v. Washington Tp., 309, 313 (1).

V. AMENDED AND SUPPLEMENTAL PLEADINGS.

Amended complaint as affected by statute of limitations, see **LIMITATION OF ACTIONS 3**; *Harrod v. Bisson*, 549, 561 (9).

PLEADING—Continued.

Supplemental complaint for damages, see **NUISANCE** 7.

20. *Amendment.—Effect, on Appeal.*—A pleading that goes out of the record by reason of its amendment cannot be considered for any purpose on appeal. *Leventhal v. Crampton*, 92, 94 (1).
21. *Complaint.—Amendment.*—The filing of an amended complaint takes the original complaint and the rulings thereon out of the record. *Oliver Typewriter Co. v. Vance*, 21, 22 (1).
22. *Complaint.—Demurrer.—Amended Complaint.*—The filing of an amended complaint while a demurrer to the original complaint was pending takes such original complaint out of the record and a subsequent ruling on the demurrer raises no question. *Cincinnati, etc., Railroad v. Wall*, 605, 608 (1).
23. *Complaints.—Demurrers.—Additional Paragraphs.—Appeal.*—On appeal, an "additional paragraph," alleging the same cause of action, filed after the sustaining of demurrers to all previous complaints and paragraphs, and after taking leave to amend, will be considered as an amended complaint, and as a waiver of all previous exceptions. *Harvey v. Hand*, 392, 394 (1).
24. *Complaint.—Supplemental.*—The original and the supplemental complaint constitute the complaint in a cause, the supplemental complaint merely bringing forward the matters accruing after the filing of the original complaint. *Niagara Oil Co. v. Jackson*, 238, 247 (11).

VI. MOTIONS.

Overruling motion to make more specific cannot be questioned on appeal, where not assigned, see **APPEAL** 25; *Wah Kee v. Clark*, 462, 464 (2).

Motion to strike out counterclaim, see **SET-OFF AND COUNTERCLAIM**.

25. *To Strike Out.—Redundant Matter.*—It is not erroneous to sustain a motion to strike from a pleading redundant, immaterial, or irrelevant matter. *Crcuch v. Lewis*, 465, 466 (1).
26. *Venire de Novo.*—Where separate verdicts are returned in a joint and several action for tort against two or more defendants, a motion for a *venire de novo* is the proper remedy. *Perley v. Schmidt Cut Stone Co.*, 344, 346 (1).
27. *Venire de Novo.—Essentials.—Appeal.*—To present any question on appeal, on a motion for a *venire de novo*, the record must disclose the grounds upon which such motion was based. *Perley v. Schmidt Cut Stone Co.*, 344, 347 (2).
28. *Judgment.—Motion in Arrest.—Complaint.—Paragraphs.*—A motion in arrest of judgment should be overruled where any one of the paragraphs of complaint is good. *Bousher v. Andrews*, 664, 667 (5), 668 (5).
29. *Complaint.—Paragraphs.—Motion in Arrest.*—Where the paragraph of complaint on which the judgment rests is sufficient on demurrer, a motion in arrest should be overruled, regardless of the sufficiency of the other paragraphs. *Bousher v. Andrews*, 664, 668 (7).

VII. ISSUES, PROOF, VARIANCE.

Variance must be raised by motion for a new trial, see **APPEAL** 5; *City of Indianapolis v. Schoentg*, 76, 78 (2).

As to variance, see **MASTER AND SERVANT** 13.

PLEADING—Continued.

30. *Complaint.—Theory.—Variance.—Appeal.*—Where the first part of the complaint in a case proceeded upon one theory and the latter part upon another, and there was a variance between the pleading and the evidence, a reversal of a judgment for the plaintiff will be ordered on appeal. *Mesker v. Leonard*, 642, 643 (1).

POSSESSION—

See LANDLORD AND TENANT; QUIETING TITLE.

PRESCRIPTION—

See EASEMENTS.

PRESUMPTIONS—

See APPEAL; RAILROADS.

PRINCIPAL AND AGENT—

See SALES.

Where there was some evidence of agency, a verdict that there was agency is conclusive on appeal, see APPEAL 62; *Peru Heating Co. v. Lenhart*, 319, 333 (10), 337 (10).

Payment by deposit, see BANKS 10.

Answer of agent's want of authority, see CONTRACTS 22.

Covenants in a deed to an agent are binding on his principal, see INJUNCTION 10; *Cincinnati, etc., Railroad v. Wall*, 605, 614 (15).

1. *Ratification.—Authority.*—Whether the general superintendent of a manufacturing company and the agent of a liability company were authorized to settle with an injured servant by paying him a certain sum and by agreeing to give him employment is immaterial, where the manufacturing company is pleading the payment of such sum as a complete discharge of the liability.

American Car, etc., Co. v. Smock, 359, 362 (5).

2. *Failing to Disclose Relationship.—Liability.—Railroads.*—An agent who contracts as an individual and who fails to disclose that he is the agent of a railway company, is liable as a principal.

Polk v. Haworth, 32, 34 (1).

3. *Contracts.—Railroads.—Interrogatories. — Instructions.*—In an action by a landowner against defendant on his contract to pay any damages caused by the construction of an interurban railroad through her land, interrogatories as to who constructed the railroad, and instructions drawn upon the theory that defendant was merely an officer of the company and would not be personally liable, are properly refused, the jury having been instructed that the plaintiff could not recover unless she proved that defendant executed the contract in his individual capacity.

Polk v. Haworth, 32, 35 (2).

PRINCIPAL AND SURETY—

See SUBROGATION; VENDOR AND PURCHASER.

Promise to pay debt of another, see FRAUDS, STATUTE OF.

Wife may be surety under an insurance policy governed by laws of New York, see INSURANCE 1, 4; *Eagle v. New York Life Ins. Co.*, 284.

PROMISSORY NOTES—

See BILLS AND NOTES.

PROXIMATE CAUSE—

See NEGLIGENCE.

QUIETING TITLE—

See NEW TRIAL; PARTITION.

1. *Mistake in Former Decree.—Cross-Complaint.*—A cross-complaint setting out that defendant's mother had obtained an order setting over to her the real estate in question as the widow of the owner, his estate being appraised at less than \$500, that the land had been erroneously described in such decree, that defendant's mother had been in possession thereof at all times and that she had conveyed it to the defendant by a correct description, and that defendant owns it, is sufficient on demurrer, the plaintiffs' complaint asserting ownership of certain interests in such land.
Kraus v. Thomas, 437, 441 (3).
2. *Complaint.*—A complaint, alleging that the plaintiffs own certain real estate, and that defendants claim an interest therein, which claim is unfounded and constitutes a cloud upon plaintiff's title, will be held sufficient. *Bousher v. Andrews*, 664, 665 (1).
3. *Ownership.—How Alleged.—Complaint.*—A complaint alleging that the plaintiffs were tenants by the entirety of certain land and that they are entitled to the free and uninterrupted possession thereof, shows ownership sufficiently to withstand a demurrer. *Bousher v. Andrews*, 664, 666 (2).
4. *Issues.—Evidence.*—In a suit to quiet title, the defendants may introduce evidence of any right which they may claim, the claim of any right by defendants being necessarily adverse to the ownership in fee by the plaintiff. *Bousher v. Andrews*, 664, 666 (3).
5. *Possession.—Evidence.*—In a suit to quiet title, the plaintiffs alleging their ownership and right to possession, and the defendants pleading a general denial, evidence of an easement claimed by defendants is admissible. *Bousher v. Andrews*, 664, 666 (4).
6. *Description.—Complaint.*—In a suit to quiet title, a description of the land in question as "twenty acres off of the west side of the northwest quarter of the northwest quarter" of a certain section, is sufficient. *Bousher v. Andrews*, 664, 667 (6).

QUO WARRANTO—

See OFFICERS.

RAILROADS—

See CARRIERS; DAMAGES; EMINENT DOMAIN; MASTER AND SERVANT; NUISANCE; PRINCIPAL AND AGENT.

As to interstate commerce freight rates, see COMMERCE.

Contracts of release, see CONTRACTS 17.

Stock in, by townships, see CORPORATIONS.

As to injunction against interurban railroad company to prevent its use of electricity, see INJUNCTION 1; *Lake Shore, etc., R. Co. v. Chicago, etc., R. Co.*, 584, 588 (5), 589 (5), 591 (5), 593 (5), 594 (5).

May be compelled to perform covenant to build certain kind of fence along right of way, see INJUNCTION 2-10; *Cincinnati, etc., Railroad v. Wall*, 605.

RAILROADS—Continued.

1. *Interurban.—Eminent Domain.*—Interurban railroad companies are quasi-public corporations, and are empowered to select their routes, and to condemn the property necessary for their use.
Lake Shore, etc., R. Co. v. Chicago, etc., R. Co., 584, 589 (6).
2. *Rights of Way.—Destroying Drains.—Negligence.—Complaint.*—A complaint alleging that defendant railroad company "negligently, wilfully and purposely broke the tile" under its main track upon its right of way, will be construed as counting on a negligent and not a wilful injury.
Barrett v. Cleveland, etc., R. Co., 668, 673 (3).
3. *Drains.—Destruction of.—Complaint.*—A complaint alleging that defendant railroad company negligently destroyed plaintiff's drain on its right of way is not sufficient, where it fails to show that the drain was a natural watercourse, or a public drain, or that defendant had knowledge thereof, or that the plaintiff had any contractual or prescriptive right to the use thereof.
Barrett v. Cleveland, etc., R. Co., 668, 674 (5).
4. *Surface-Waters.*—Railroad companies are not required to provide for the drainage of surface-waters from the lands of others.
Barrett v. Cleveland, etc., R. Co., 668, 674 (6).
5. *Interurban.—Nuisance.*—The use of a high voltage of electricity by an interurban railroad does not constitute a nuisance *per se*, where it is authorized by law, though the circumstances and manner of such use may make it a nuisance.
Lake Shore, etc., R. Co. v. Chicago, etc., R. Co., 584, 588 (3).
6. *Crossings.—Look and Listen Rule.*—It is the duty of a traveler approaching a railroad crossing to listen and look for approaching trains, to such an extent as the surroundings permit, before attempting to cross, and a failure therein precludes a recovery on the ground of contributory negligence.
Toledo, etc., R. Co. v. Lander, 56, 63 (6).
7. *Duty.—Performance.—Presumptions.—Negligence.*—A traveler may properly assume that a railroad company will perform its duty in reference to the giving of the statutory signals, and its failure so to do constitutes negligence.
Toledo, etc., R. Co. v. Lander, 56, 63 (7).
8. *Failure to Give Signals.—Travelers.—Care Required.*—The failure of a railroad company to give the statutory signals at a highway crossing will not justify a traveler in failing to exercise care commensurate with the usual dangers of crossing the track.
Toledo, etc., R. Co. v. Lander, 56, 63 (8).
9. *Crossing Accidents.—Due Care.—Presumptions.*—A traveler killed on a highway crossing is presumed to have used due care as well as to have seen and heard what was visible and audible.
Chicago, etc., R. Co. v. Ginther, 12, 20 (5).
10. *Crossings.—Failure to Give Signals.*—The failure of a railroad company to cause the whistle of its train to be sounded at a crossing constitutes negligence *per se*.
Chicago, etc., R. Co. v. Coon, 675, 680 (2), 686 (2).
11. *Crossings.—Running Train Without Headlight.*—The running of a train, without a headlight, on a dark night, through a town, proximately causing an injury to a traveler on a crossing, constitutes negligence.
Chicago, etc., R. Co. v. Coon, 675, 685 (9).
12. *Crossings.—Injuries.—Evidence.—Contributory Negligence.*—The fact that a traveler stopped his horses on the railroad cross-

RAILROADS—Continued.

ing just before he was struck does not make him guilty of contributory negligence as a matter of law, where the night was dark and stormy and the train approached noiselessly without a headlight and without signaling.

Chicago, etc., R. Co. v. Coon, 675, 686 (10).

13. *Crossing Accidents.—Death.—Beneficiaries.—Complaint.*—A complaint against a railroad company for the negligent killing of decedent upon a highway crossing must allege the existence of the beneficiaries of such action, such question of beneficiaries being made an issuable fact by the filing of a general denial.

Toledo, etc., R. Co. v. Lander, 56, 59 (1).

14. *Crossing Accidents.—Death.—Beneficiaries.—Complaint.*—A complaint alleging that plaintiff's decedent was killed, "leaving surviving him as his only heirs at law and next of kin Cora Lander, his widow, and Vera Lander, and Lucile Lander, his infant children," shows his beneficiaries sufficiently "to enable a person of common understanding to know what is intended."

Toledo, etc., R. Co. v. Lander, 56, 59 (2).

15. *Crossing Accidents.—Death.—Beneficiaries.—Complaint.*—A complaint alleging that defendant railroad company negligently killed plaintiff's decedent, that he was an able-bodied man capable of earning five dollars a day, that the action was prosecuted for the benefit of decedent's widow and children who have suffered damage in a certain amount, sufficiently shows that defendant's negligence caused decedent's death and that the beneficiaries were damaged thereby.

Toledo, etc., R. Co. v. Lander, 56, 60 (3).

16. *Crossings.—Complaint.*—A complaint alleging that the plaintiff in driving along a street approached a railroad crossing, that he checked his horses, looked and listened but neither saw nor heard a train, that the night was dark and stormy, that when he arrived upon the track the defendant negligently ran its train without signal, noise or headlight, and at an excessive speed against him, to his damage, states a cause of action.

Chicago, etc., R. Co. v. Coon, 675, 682 (5).

17. *Crossing Accidents.—Negligence.—Proximate Cause.—Complaint.*—A complaint alleging that plaintiff's decedent was driving a team hitched to a wagon over defendant railroad company's track on a highway crossing, that defendant negligently ran its train at an excessive speed and failed to sound the whistle or to ring the bell as it approached the crossing, that a storm was raging and decedent was unable to hear the train until it was too late, that the defendant negligently failed to place a headlight on the locomotive, and that the locomotive so negligently run "struck said team and wagon * * * and killed the decedent," sufficiently shows that the decedent was killed by the engine, and that the alleged negligence was the proximate cause of the death.

Chicago, etc., R. Co. v. Ginther, 12, 14 (2).

18. *Use of Streets.—Frightening Horses.—Last Clear Chance.—Complaint.*—A complaint alleging that the plaintiff was driving his horse along a street, that the defendant's interurban car approached from the rear at an excessive speed, making unusual and unnecessary noises, frightening plaintiff's horse, which was gentle and safe and which was driven in a careful manner, that defendant's servants could have seen that plaintiff's position was perilous, and that he could not escape, that defendant negligently

RAILROADS—Continued.

continued its reckless speed, and blowing its whistle, in an endeavor to pass him, knowing that the horse was running away, to plaintiff's damage, is sufficient.

Fort Wayne, etc., Traction Co. v. Miller, 633, 635 (1).

19. *Running Down Travelers.—Wilful Injuries.—Complaint.*—A complaint alleging that the plaintiff was driving along a street, that the defendant's car approached from the rear at an excessive speed, causing unusual noises and frightening plaintiff's horse, that defendant's servants saw plaintiff's plight and wilfully and maliciously sounded the whistle, causing such horse to run away, that they then purposely and maliciously pursued said horse in order to frighten it still more, that they knew the plaintiff could not stop the horse nor extricate himself from the danger, that, seeing the horse plunge and rear, they continued maliciously to sound the whistle intending to cause the horse to continue to run away, to plaintiff's damage, shows a wilful injury.

Fort Wayne, etc., Traction Co. v. Miller, 633, 638 (3).

20. *Crossing.—Negligence.—Evidence.*—Evidence that defendant railroad company ran its train forty miles an hour, that the plaintiff's decedent was riding in a buggy and could have seen the approaching train three seconds before it killed him, that obstructions prevented his hearing the train, that no crossing signal was given, and that he turned his horse to avoid a collision, but the train struck the horse, killing decedent, sustains a verdict for the plaintiff.

Toledo, etc., R. Co. v. Lander, 56, 64 (9).

21. *Crossing Accidents.—Contributory Negligence.—Evidence.*—In determining the question of the contributory negligence of a traveler injured or killed upon a highway crossing, the jury should consider all the circumstances, including the railroad company's conduct.

Chicago, etc., R. Co. v. Ginther, 12, 20 (6).

22. *Crossing Accidents.—Instructions.*—In an action by a pedestrian against a railroad company for damages sustained at a street crossing, an instruction that the plaintiff, to recover, must establish by a preponderance of the evidence (1) that he received the injuries as alleged in the complaint, and (2) that such injuries were the immediate and proximate result of defendant's carelessness and negligence, as alleged in the complaint, and that if the plaintiff so failed to establish either, he could not recover, is correct, and where followed by an instruction as to the effect of contributory negligence, is not prejudicial.

Harmon v. Foran, 262, 267 (3).

23. *Crossing Accidents.—Ordinances.—Instructions.*—In an action for damages sustained at a street crossing because of defendant railroad company's violation of a city ordinance, an instruction that the plaintiff, in the absence of knowledge to the contrary, had a right to assume that defendant would obey the city ordinance in reference to the moving of its trains, is correct.

Harmon v. Foran, 262, 268 (5).

24. *Crossing Accidents.—Ordinances.—Lookout on "Rear End of Locomotive."*—*Instructions.*—In an action against a railroad company for injuries at a street crossing caused by defendant railroad company's running backwards a locomotive and tender without a lookout on the rear of the tender, in violation of a city ordinance requiring all companies so operating trains to provide a watchman on the "rear end of such locomotive, car, or train of cars," an instruction that it was the defendant's duty when it

RAILROADS—Continued.

ran an engine and tender backwards to station a watchman on the rear of the tender, is not objectionable.

Harmon v. Foran, 262, 268 (6).

25. *Crossing Accidents.—Contributory Negligence.—Presumptions.*—In an action for damages sustained at a street crossing, because of defendant railroad company's violation of a city ordinance, an instruction that the presumption is that when a person approaches a railroad crossing along a street or highway, and is injured in attempting to cross, he is not guilty of contributory negligence, is incorrect, there being no presumption in such case. *Nichols v. Baltimore, etc., R. Co.*, 33 Ind. App. 229, *Pittsburgh, etc., R. Co. v. Reed*, 36 Ind. App. 67, *Cleveland, etc., R. Co. v. Schneider*, 40 Ind. App. 38, and *Wamsley v. Cleveland, etc., R. Co.*, 41 Ind. App. 147, partly overruled.

Harmon v. Foran, 262, 269 (7), 270 (7).

26. *Crossing Accidents.—Failure to Give Signals.—Absence of Headlight.—Excessive Speed.—Contributory Negligence.—Instructions.*—In an action for the death of a traveler killed upon a highway crossing, an instruction that in determining the question of the decedent's contributory negligence the jury might consider the facts, if proved, that the defendant railroad company failed to sound the whistle or to ring the bell, as the train approached the crossing, and that the train was running without a headlight at a high speed on a dark, stormy night, was properly given.

Chicago, etc., R. Co. v. Ginther, 12, 15 (4).

27. *Crossing Accidents.—Contributory Negligence.—Instructions.*—In an action by the personal representative of decedent who was killed by a railroad company on a highway crossing, an instruction that the plaintiff, on proof of defendant's negligence, should recover unless the decedent "contributed materially and directly to his death," is not erroneous.

Toledo, etc., R. Co. v. Lander, 56, 65 (11).

28. *Crossings.—Statutory Duties.—Instructions.*—An instruction practically quoting the statute requiring railroad companies to equip locomotives with a whistle and a bell, prescribing the use thereof, and the penalty for the neglect thereof, and instructing the jury that if certain facts were found, the law would authorize a recovery by the plaintiff, is not bad because the penalty had reference to engineers, where such feature of the instruction was not afterwards referred to, and where there is nothing in the record to show that the jury was influenced against the company.

Toledo, etc., R. Co. v. Lander, 56, 65 (12).

29. *Damages.—Evidence.—Instructions.*—An instruction, in a personal injury case against a railroad company, which does not set out the elements of damages recoverable but limits such damages to the sum that the jury may believe that he "ought to recover," not exceeding the demand, when considered with other instructions limiting the recovery to the amount warranted by the evidence, is not misleading.

Toledo, etc., R. Co. v. Lander, 56, 66 (13).

30. *Crossing Accidents.—Contributory Negligence.—Instructions.—Curing by Interrogatories.*—In an action for injuries sustained by a traveler at a street crossing, answers to the interrogatories to the jury that the plaintiff was not guilty of contributory negligence do not cure an erroneous instruction that the plaintiff is

RAILROADS—Continued.

presumed to be free from contributory negligence, such answers probably being influenced by such erroneous instruction.

Harmon v. Foran, 262, 270 (9), 271 (9)

31. *Negligence.—Contributory.—Verdict.*—A general verdict for the plaintiff, in an action against a railroad company for negligently killing decedent, constitutes a finding that the defendant was negligent and that decedent was free from contributory negligence.

Toledo, etc., R. Co. v. Lander, 55, 61 (4).

32. *Crossing Accidents.—Contributory Negligence.—Interrogatories.*—Answers to interrogatories that the decedent riding in an open buggy approached the railroad crossing at the rate of two miles an hour, that the defendant company ran its train at the rate of 40 miles an hour, that when decedent was 40, 30, 20 and 10 feet, respectively, from the crossing he could have seen the train 496, 455, 412 and 364 feet, respectively, that no whistle was sounded and no bell rung, and that buildings and a live engine standing nearby prevented his hearing the train, are not in irreconcilable conflict with a general verdict for the plaintiff.

Toledo, etc., R. Co. v. Lander, 56, 61 (5).

33. *Crossing Accidents.—Violating Ordinances.—Backing Engine Without Light or Lookout.—Interrogatories.*—Answers to interrogatories to the jury that the plaintiff looked and listened for an approaching train before going upon the defendant's railroad track on a street crossing, that he neither saw nor heard any, that he was prevented therefrom by the noise of another train, and the dark and rainy night, and that because of an embankment and curve he could not see the approaching engine before he reached the point where he was struck, are not in conflict with a general verdict for the plaintiff.

Harmon v. Foran, 262, 266 (2).

34. *Running Down Travelers.—Noises.—Frightening Horses.—Evidence.*—In an action by a traveler for injuries sustained because of the approach of defendant's car and of unusual and unnecessary noises made, thereby frightening plaintiff's horse and causing it to run away, it is not necessary for the plaintiff to show that such operation or noises were not necessary nor usual at other times, or under other circumstances.

Fort Wayne, etc., Traction Co. v. Miller, 633, 641 (5).

35. *Speed.—Nonexperts.—Evidence.*—Nonexperts are competent to testify as to the speed of a train.

Fort Wayne, etc., Traction Co. v. Miller, 633, 641 (6).

RATIFICATION—

See CONTRACTS.

REAL PROPERTY—

See EASEMENTS; LANDLORD AND TENANT; LIFE ESTATES; MORTGAGES; QUIETING TITLE; SPECIFIC PERFORMANCE; VENDOR AND PURCHASER.

Commissions for sales of, see CONTRACTS 18.

Breach of contract for sale of, jurisdiction of action for, see COURTS.

Contracts for sale of, see FRAUDS, STATUTE OF.

New trial in cases of, see NEW TRIAL.

Use of, see TORTS.

REFORMATION—

1. *Deeds.—Mistake.—Fraud.*—Equity will reform a deed whenever through a mutual mistake, or a mistake of one of the parties accompanied by the fraud of the other, it does not express the agreement of the parties. *Harvey v. Hand*, 392, 398 (4).
2. *Contracts.—Consideration.—Deeds.—Complaint.*—A complaint to reform a deed must allege a valuable consideration for the antecedent contract, a mere volunteer being unable to maintain such suit. *Harvey v. Hand*, 392, 398 (6).
3. *Deeds.—Consideration of Antecedent Contract.—Trust.—Construction of.*—In a suit for the reformation of a deed the court will perhaps not consider the deed as reformed in order to ascertain if a valuable consideration has been yielded; but the court, in determining whether a valid and enforceable trust is created, will look to the deed as reformed. *Harvey v. Hand*, 392, 399 (7).
4. *Deeds.—Trusts.—Consideration.—Family Settlements.—Complaint.*—A complaint to reform a deed so as to show a trust therein in favor of plaintiffs, alleging a consideration of \$2,000, love and affection, and a family settlement, for the making of such deed, states a sufficient consideration. *Harvey v. Hand*, 392, 400 (8).
5. *Laches.—Notice.—Complaint.*—A complaint by the beneficiaries of an alleged trust, alleging that their father in executing a deed to their sister omitted by a mutual mistake of himself, such sister and the scrivener, to create such trust, that the father had the deed recorded at once, but did not, during his lifetime, learn of such omission, and that it was not until a short time after the father's death that such beneficiaries learned of it, sufficiently shows diligence, the rights of no third persons having intervened. *Harvey v. Hand*, 392, 401 (9).
6. *Deeds.—Statute of Frauds.*—A suit to reform a deed is not an action to enforce a parol agreement for the sale of land, and is not affected by the statute of frauds. *Harvey v. Hand*, 392, 402 (10).

REHEARING—

See APPEAL.

REMAINDERS—

See LIFE ESTATES.

Condemnation of, see EMINENT DOMAIN.

Inheritance of crops by remaindermen, see LANDLORD AND TENANT 2; *Vauter v. Frame*, 481, 483 (1).

RENTS—

See LANDLORD AND TENANT.

REPLY—

See PLEADING.

RESCISSION—

See INSURANCE.

REVIVAL—

Of action, see ABATEMENT; ACTION.

RIGHTS OF WAY—

See EASEMENTS; RAILROADS.

RULES—

See COURTS.

SALES—

See ACCOUNTS; CONTRACTS; VENDOR AND PURCHASER.

Jurisdiction in action for breach of contract for, see COURTS.

Principal and Agent.—Evidence.—Evidence that the plaintiff engaged to deliver certain quantities of hay to a person in charge of a stable at the Indiana State fair grounds, such stable having a large sign over the door with defendant's name thereon, showing that such company dealt in hay and grain, that, later, the general manager of such company drove to plaintiff's house and doubled the order, that the plaintiff delivered the hay to men at such stable and that he had not been paid therefor, sustains a judgment for plaintiff against such company, whether the sale was made in the name of the company or not.

Pennsylvania, etc., Sup. Co. v. Fosnotte, 166, 169 (5).

SET-OFF AND COUNTERCLAIM—

1. *Motion to Strike Out.—Partners.—Surplusage.*—In a counterclaim by defendant against plaintiffs, it is not erroneous to sustain a motion to strike therefrom allegations that the plaintiffs had been partners for many years and that defendant had been for many years in the general contracting business, where it is not alleged that plaintiffs entered into the contract in question as partners, such allegations being mere surplusage.

Crouch v. Lewis, 465, 467 (2).

2. *Redundancies.—Striking Out.*—It is harmless to strike from a counterclaim certain allegations, not improper in themselves, where substantially similar ones are left therein.

Crouch v. Lewis, 465, 467 (3), 468 (3), 469 (3).

3. *Sufficiency.*—A counterclaim to be good must contain the averments necessary to a complaint for the same cause.

Crouch v. Lewis, 465, 467 (4).

4. *Negating Defenses.—Striking Out.*—It is not erroneous to sustain a motion to strike from a counterclaim allegations negating a defense thereto.

Crouch v. Lewis, 465, 468 (7).

SETTLEMENT—

See COMPROMISE; REFORMATION.

SHOP-BOOKS—

See EVIDENCE.

SIDEWALKS—

See MUNICIPAL CORPORATIONS.

SPECIAL FINDINGS—

See TRIAL.

SPECIFIC PERFORMANCE—

May be negatively enforced by injunction, see INJUNCTION 7, 10;
Cincinnati, etc., Railroad v. Wall, 605.

1. *Contracts*.—A suit for the specific performance of a contract is an equitable proceeding, and imports that the contract will be ordered performed, if at all, substantially as agreed upon.
Straus v. Yeager, 448, 460 (11).
2. *Contracts Relating to Personal Property*.—*Value*.—Specific performance lies to enforce contracts relating to personal property only when such property has a peculiar value.
Vernon, etc., R. Co. v. Washington Tp., 309, 316 (5).
3. *Contract to Convey Real Estate*.—*Possession*.—An oral contract by a father to purchase real estate for his daughter will be specifically enforced, where she was put in possession under the contract, where the purchase price was paid, and where the father repudiated the contract.
Timmonds v. Taylor, 531, 535 (3).
4. *Contracts*.—*Demand*.—*When Unnecessary*.—Where the vendor repudiates his contract to convey, or places himself in a position which would render a demand unavailing, no demand is necessary before bringing a suit for specific performance.
Timmonds v. Taylor, 531, 536 (4).
5. *Refusal to Perform Contract*.—*Demand*.—Where the contract fixes the time for making a conveyance upon payment of the purchase price, a failure to make the conveyance perfects the purchaser's right to compel the performance of the contract.
Timmonds v. Taylor, 531, 536 (5).
6. *When Granted*.—In order to enforce specific performance of a contract it must be founded upon a valuable consideration, it must be definite, fair, just, and specifically enforceable against both parties without hardship against either, and there must be no equally adequate legal remedy.
Cincinnati, etc., Railroad v. Wall, 605, 611 (9).
7. *Contracts*.—*Definiteness*.—*Parol Evidence*.—*Fences*.—*Injunction*.—A contract by a railroad company to construct and maintain along its right of way "a standard fence of woven wire, with barbs on top, sufficient to turn all kinds of stock" is susceptible of specific performance, parol evidence being admissible to apply the terms thereof to the subject-matter, and the violation of such contract may be enjoined.
Cincinnati, etc., Railroad v. Wall, 605, 611 (10), 614 (10).
8. *Building Contracts*.—Ordinarily, building contracts will not be specifically enforced; but in certain cases, where justice cannot be otherwise secured, they will be so enforced.
Cincinnati, etc., Railroad v. Wall, 605, 614 (13).
9. *Discretion*.—The right to specific performance is a matter of sound legal discretion, controlled by equitable principles, and exercised upon a consideration of all the circumstances of the particular case.
Cincinnati, etc., Railroad v. Wall, 605, 614 (14).

STATUTE OF FRAUDS—

See FRAUDS, STATUTE OF.

STATUTES—

For statutes cited and construed, see p. xxvi.

See MUNICIPAL CORPORATIONS; WILLS.

Relating to sales of lands, see DEEDS.

1. *Words.—Construction.*—The words used in a statute should be given their ordinary meaning, unless it clearly appears that a different meaning was intended.

Broicnell Improv. Co. v. Nixon, 195, 200 (3).

2. *Derogatory of Common Law.—Construction.*—Statutes in derogation of the common law will be strictly construed, but not in such manner as to defeat their purpose.

Dunn v. Means, 383, 388 (3).

3. *Construction.—In Pari Materia.*—All statutes on the same subject-matter should be construed *in pari materia*; and where a statute is in derogation of the common law no exceptions not contained therein will be allowed.

Wilson v. Jackson Hill Coal, etc., Co., 150, 152 (2).

• **STOCKHOLDERS—**

See CORPORATIONS.

STREAMS—

See WATERS.

STREETS—

See MUNICIPAL CORPORATIONS.

SUBROGATION—

1. *Sureties.—Vendor and Purchaser.—Liens.*—If a mortgagor is primarily liable for the payment of his mortgage, he cannot be subrogated to the rights of the mortgagee; but where he has conveyed the land to a grantee who has agreed to pay the lien, such mortgagor is subrogated, upon payment of the mortgage, to the rights of the mortgagee in the enforcement of the lien against the land.

Gregory v. Arms, 562, 569 (6).

2. *Vendor and Purchaser.—Liens.—Deeds.—Principal and Surety.—Answer.*—In a suit by the personal representative of defendant's remote grantor, to recover the amount of a lien upon defendant's land, paid by such representative, an answer that such lien constituted the individual debt of decedent, that it continued his debt until his death, and that the debt was fully paid by such representative before the bringing of the suit, is insufficient where the complaint alleged that the deed from decedent was executed "subject to all liens," of which the lien in question was one, such answer failing to show that decedent was primarily liable as a principal.

Gregory v. Arms, 562, 571 (10).

3. *Vendor and Purchaser.—Liens.—Deeds.—Answer.—Evidence.*—In a suit by a remote grantor's personal representative to recover the amount of a lien upon defendant's real estate, paid by such representative, an answer that such decedent as a part consideration for his conveyance to the defendant's grantor orally agreed to pay such lien, and that he and the plaintiff subsequently paid it, is sufficient, though there was a provision in the deed from decedent that the land was conveyed "subject to all liens," oral evidence being admissible to show the real consideration.

Gregory v. Arms, 562, 572 (11).

SUBROGATION—Continued.

4. *Vendor and Purchaser.—Liens.—Forbearance to Sue.—Consideration.—Answer.*—In a suit by the personal representative of a remote vendor for subrogation to the rights of a mortgagee of defendant's lands, the complaint alleging that such remote vendor's deed contained a provision that the land was conveyed "subject to all liens," an answer that the defendant accepted his deed upon the representation that the specific mortgage assumed was the only lien against the land, that he believed such representation, being ignorant of another mortgage thereon, that when he learned of the other mortgage he called upon such remote vendor and threatened to institute an action against defendant's vendor, that as a settlement thereof such remote vendor agreed to pay such mortgage, and that pursuant thereto, he paid interest thereon, and after his death, his administratrix paid it, is sufficient, such agreement being supported by a consideration, since he might have become liable, having acknowledged that he was primarily liable for the debt.

Gregory v. Arms, 562, 574 (13), 577 (13).

5. *Vendor and Purchaser.—Liens.—Agreements to Pay.—Consideration.—Answer.*—Where a mortgagor conveys the mortgaged lands "subject to all liens," and his grantee conveys without mentioning such mortgage in his deed and such mortgagor and his personal representative are compelled to pay such mortgage, an answer, in a suit by such representative for subrogation to the rights of the mortgagee, that the defendant demanded that such mortgagor pay the debt, that he was financially embarrassed and could not pay it, but promised that if time for payment were extended by the mortgagee—the State of Indiana—he would pay it, and that defendant granted such extension, is bad, since the defendant was powerless to grant such an extension.

Gregory v. Arms, 562, 577 (16).

"TAXES"—

See WORDS AND PHRASES.

TELEGRAPHS AND TELEPHONES—

See ELECTRICITY ; NEGLIGENCE.

1. *Suspending Uninsulated Telephone Wire Over Trolley Wire.—Negligence.*—The maintenance of an uninsulated telephone wire over a trolley wire constitutes negligence.
Cumberland Tel., etc., Co. v. Kranz, 67, 73 (5), 75 (5).
2. *Electricity.—Injury to Animals on Private Grounds.*—Where a telephone company maintained an uninsulated wire over a trolley wire, and such telephone wire broke and fell on the trolley wire, thereby becoming charged with electricity and killing plaintiff's horses, the fact that such horses, at the time they were killed, were on private property, does not affect such company's liability, so long as they were there rightfully.
Cumberland Tel., etc., Co. v. Kranz, 67, 74 (7).
3. *Maintenance of Telephone Wire Over Trolley Wire.—Injuries to Animals.—Proximate Cause.*—The maintenance of an uninsulated telephone wire over a trolley wire, such telephone wire breaking during a storm and falling upon the trolley wire, thereby killing plaintiff's horses, constitutes the proximate cause of the death of such horses.
Cumberland Tel., etc., Co. v. Kranz, 67, 74 (8).

TELEGRAPHS AND TELEPHONES—Continued.

4. *Common Carriers.*—Telephone companies are common carriers of news; and the property used in such business is impressed with a public use. *Mooreland, etc., Tel. Co. v. Mouch*, 521, 524 (1).
5. *Discrimination.*—Telephone companies must serve the public without discrimination.
Mooreland, etc., Tel. Co. v. Mouch, 521, 524 (2).
6. *Legislative Control Over.*—The legislature has control over telephone companies.
Mooreland, etc., Tel. Co. v. Mouch, 521, 524 (3).
7. *Discrimination.—Complaint.*—A complaint alleging that defendant telephone company charged \$1 a month for residence telephones and \$1.25 a month for "business telephones," that the plaintiff had a residence telephone and that the defendant demanded the payment of \$1.25 a month therefor and that no one else was charged such price for a residence telephone, sufficiently shows a discrimination, and entitles the plaintiff to injunctive relief. *Mooreland, etc., Tel. Co. v. Mouch*, 521, 525 (4).
8. *Discrimination.—Answer.*—In a suit to enjoin a telephone company from refusing to serve the plaintiff, the complaint alleging that the company wrongfully demanded a "business" rate for his residence telephone, an answer that the plaintiff, without right, was using his residence telephone for business purposes, is insufficient, since it fails to show that others, similarly situated, were not doing likewise.
Mooreland, etc., Tel. Co. v. Mouch, 521, 527 (5).

TELEPHONES—

See TELEGRAPHS AND TELEPHONES.

TENANCIES IN COMMON—

See LANDLORD AND TENANT 3.

TENDER—

See BILLS AND NOTES 6; VENDOR AND PURCHASER 7, 8.

How shown by answer, see LANDLORD AND TENANT 5; *Wah Kee v. Clark*, 462, 464 (4).

TEXT-BOOKS—

For text-books cited, see p. xxix.

TORTS—

See LIMITATION OF ACTIONS.

1. *Use of Property.—Damages.*—The owner of property has a right to use it in a reasonable manner, and if in the use thereof incidental injury is done to another, no recompense can be demanded therefor.
Niagara Oil Co. v. Jackson, 238, 241 (1).
2. *Joint and Several.*—If several persons are required to perform a duty their failure to perform it, or their negligence in performing it, renders them liable jointly and severally to one injured thereby.
Peru Heating Co. v. Lenhart, 319, 324 (1).
3. *Contracts.—Damages.*—A defendant may be liable to the plaintiff in tort for damages caused by him, though no contractual relations whatever existed between them.
Peru Heating Co. v. Lenhart, 319, 325 (2).
4. *Acts.—Conditions.*—If the defendant's original wrongful act or omission supplied the condition causing the subsequent act to be hurtful, he is liable therefor.
Peru Heating Co. v. Lenhart, 319, 329 (6).

TOWNSHIPS—

Stock in railroads, see CORPORATIONS.

Contract with auditing company to investigate books, void, where company was to prosecute claims at its own expense for part of proceeds, see CONTRACTS 4; *Lancaster Tp. v. Graves*, 499, 501 (2).

TRESPASS—

See NUISANCE.

TRIAL.

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|--------------------------------|--|
| I. RECEPTION OF EVIDENCE, 1-4. | IV. VERDICT AND INTERROGATORIES, 16-22. |
| II. DIRECTING VERDICT, 5. | V. SPECIAL FINDINGS AND CONCLUSIONS OF LAW, 23-29. |
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See NEW TRIAL; PLEADING; VENUE.

Parties may be added after change of venue, see PARTIES.

I. RECEPTION OF EVIDENCE.

Objections to depositions, see DEPOSITIONS.

As to trial court's discretion, see EVIDENCE 4.

1. *Exclusion of Evidence.—Offer.*—To save any question on the exclusion of evidence, the offer of proof must precede the ruling upon the objections thereto. *Leventhal v. Crampton*, 92, 95 (5).
2. *Exclusion of Evidence.—When Harmless.*—The exclusion of evidence upon an issue is harmless where such issue was found in the complaining party's favor.
Hinshaw v. Security Trust Co., 351, 359 (11).
3. *Inadmissible.—Introduction of.—Objecting to Similar.*—The fact that a party made no objection when its opponent introduced incompetent evidence in the former's favor does not estop such party from objecting to similar incompetent evidence offered against it.
Independent Torpedo Co. v. J. E. Clark Oil Co., 124, 127 (6).
4. *Wrongful Admission of Evidence.—When Harmless.*—In an action by tenants of the first floor of a building against the owner thereof and a heating company for their alleged negligence in turning off the hot-water heat in the second floor, producing conditions whereby plaintiffs' goods were damaged, evidence of the understanding of the owner's servant as to why such owner referred the servant to the heating company for instructions in turning off such heat instead of having such servant do it, is improper; but where the evidence given was but a restatement of what had been given before at the instance of both parties its admission was harmless.
Peru Heating Co. v. Lenhart, 319, 332 (9).

II. DIRECTING VERDICT.

Directing verdict, see BILLS AND NOTES 18; CONTRACTS 27.

5. *Peremptory Instructions.*—Where there is some evidence tending to sustain the material allegations of plaintiff's complaint, a peremptory instruction for defendant should be refused.

Eppert v. Gardner, 188, 193 (7).

Princeton Coal, etc., Co. v. Downer, 136, 143 (6).

TRIAL—Continued.**III. INSTRUCTIONS.**

Instructions may be brought into record by special bill of exceptions, see **APPEAL 14**; *Republic Iron, etc., Co. v. Lulu*, 271, 279 (6).

Filing of instructions, how shown, see **APPEAL 17**; *City of Indianapolis v. Schoenig*, 76, 83 (8).

Errors in giving or refusing instructions cannot be assigned independently on appeal, see **APPEAL 24**; *Chicago, etc., R. Co. v. Coon*, 675, 683 (6).

Duty of court to instruct as to defenses, see **BILLS AND NOTES 16**; *Halstead v. Woods*, 127, 131 (2).

Instruction may assume undisputed facts, see **BILLS AND NOTES 17**; *Halstead v. Woods*, 127, 134 (6).

Instructions in cases against carriers, see **CARRIERS**.

Instructions in condemnation cases, see **EMINENT DOMAIN**.

Instructions in actions for personal injuries, see **MASTER AND SERVANT 17-27**.

Erroneous instructions, ground for new trial, see **NEW TRIAL 9**.

Instructions in action against agent, see **PRINCIPAL AND AGENT**.

Instructions in railroad cases, see **RAILROADS 22-30**.

Instructions in actions for labor, see **WORK AND LABOR**.

6. *Incorrect*.—Incorrect instructions should be refused.
Lucas v. Rhodes, 211, 221 (8).
7. *Applicability*.—Instructions not applicable to the evidence should be refused. *Toledo, etc., R. Co. v. Lander*, 56, 66 (15).
8. *Duplication*.—It is not erroneous to refuse to duplicate instructions.
Chicago, etc., R. Co. v. Coon, 675, 688 (13).
Lucas v. Rhodes, 211, 221 (9).
Republic Iron, etc., Co. v. Lulu, 271, 282 (10).
Toledo, etc., R. Co. v. Lander, 56, 66 (16).
9. *How Considered*.—Instructions should be considered as a whole; and if they fairly present the law of the case they will not be held prejudicial.
Chicago, etc., R. Co. v. Coon, 675, 689 (14).
Eppert v. Gardner, 188, 194 (8).
Harmon v. Foran, 262, 268 (4).
Lucas v. Rhodes, 211, 221 (7).
10. *Imperfect*.—*Harmless Error*.—The giving of an instruction which is imperfect, but which in the light of other instructions given, could not have misled the jury, does not constitute reversible error.
Toledo, etc., R. Co. v. Lander, 56, 65 (10).
11. *Incomplete*.—*Duty of Objecting Party*.—Where an instruction is merely incomplete, the party complaining thereof should present to the trial judge a complete one.
Toledo, etc., R. Co. v. Lander, 56, 66 (14).
12. *Refusal to Give*.—*Predication of Error Upon*.—Reversible error cannot be predicated upon the court's refusal to give instructions requested unless it is specifically pointed out by appellant in what manner such instructions were relevant to the issues and that they were warranted by the evidence.
Eppert v. Gardner, 188, 194 (9).
13. *Damages*.—*Considering All the Evidence*.—*Appeal*.—*Briefs*.—An instruction, in an action for damages, that the jury in estimating the damages "has the right to take into consideration all the facts and circumstances proved by the evidence," constitutes

TRIAL—Continued.

reversible error, where the appellant's brief points out evidence admitted on other points, liable to prejudice the jury when estimating the damages. *Mesker v. Leonard*, 642, 644 (2).

14. *Directing Recovery Upon Proof of Paragraph of Complaint.—Interrogatories.*—An instruction that if the plaintiff had proved the material allegations of any of the three paragraphs of her complaint, the jury may find for the plaintiff, is harmless, where other instructions outlined the conditions under which she might recover; and especially where the answers to the interrogatories showed that the plaintiff was free from contributory negligence, and also indicated that no harm resulted from such instruction.

Harrod v. Bisson, 549, 558 (5).

15. *Contributory Negligence.—Interrogatories.*—An instruction that the burden of proving contributory negligence is on defendant, and that "unless he has shown the same by a preponderance of the evidence," he should lose on such issue, does not require that the testimony introduced by defendant alone must show such freedom.

Harrod v. Bisson, 549, 559 (6).

IV. VERDICT AND INTERROGATORIES.

As to joint verdict, see **APPEAL 64**.

Verdict in actions for personal injuries, see **MASTER AND SERVANT 30, 31**.

Verdict and interrogatories in negligence case, see **NEGLIGENCE 22**; *Peru Heating Co. v. Lenhart*, 319, 335 (11).

Receiving separate verdicts against joint defendants, see **NEW TRIAL 10**.

Verdict in railroad cases, see **RAILROADS**.

Interrogatories in action against heating company, see **CORPORATIONS 7**.

Interrogatories in actions for personal injuries, see **MASTER AND SERVANT 28-30**.

Interrogatories in action against an agent, see **PRINCIPAL AND AGENT**.

Curing instruction by interrogatories, see **RAILROADS 30**.

Interrogatories in railroad cases, see **RAILROADS 32, 33**.

16. *Interrogatories to Jury.—Submission of, by Court.*—Under §572 Burns 1908, Acts 1897 p. 128, providing that in all actions tried by a jury, "when requested by either party, the court shall instruct them * * * to find specially upon particular questions of fact to be stated to them in writing in the form of interrogatories on any or all the issues in the cause," it is not error for the judge to submit, on his own motion, an interrogatory concerning a fact within the issues. *Halstead v. Woods*, 127, 129 (1).

17. *Verdict.—Issues Decided.*—A general finding constitutes a finding on every issue in favor of the prevailing party.

Brett v. Pretorious, 527, 531 (4).

Ittenbach v. Thomas, 420, 426 (2).

18. *General Verdict.—Interrogatories.*—The general verdict controls answers to the interrogatories unless such answers are irreconcilable therewith on any supposable evidence within the issues.

Harmon v. Foran, 262, 266 (1).

Ittenbach v. Thomas, 420, 427 (3), 434 (3).

Lucas v. Rhodes, 211, 221 (10).

Peru Heating Co. v. Lenhart, 319, 336 (12).

Winona, etc., R. Co. v. Rousseau, 248, 261 (13).

TRIAL—Continued.

19. *Interrogatories.—Verdict.—Appeal.*—In determining whether the answers to the interrogatories to the jury overturn the general verdict the court on appeal will consider only such interrogatories and answers, the general verdict and the pleadings.
Ittenbach v. Thomas, 420, 426 (1).
Peru Heating Co. v. Lenhart, 319, 336 (12).
20. *Interrogatories.—Contradictory Answers.*—Conflicting answers to interrogatories to the jury nullify one another.
Republic Iron, etc., Co. v. Lulu, 271, 279 (5).
21. *Conflict on Certain Issues.*—Where the answers to the interrogatories to the jury are in irreconcilable conflict with the general verdict upon some of the issues, the general verdict must stand, if at all, upon the remaining issues.
Ittenbach v. Thomas, 420, 427 (4).
22. *Verdict.—Inferences.—Appeal.*—On appeal, all reasonable inferences are drawn in favor of the general verdict.
Winona, etc., R. Co. v. Rousseau, 248, 260 (12).

V. SPECIAL FINDINGS AND CONCLUSIONS OF LAW.

- Special findings in action for breach of contract, see **CONTRACTS** 26.
- Special findings in suit to foreclose street assessment lien, see **MUNICIPAL CORPORATIONS** 23; *Brownell Improv. Co. v. Nicon*, 195, 207 (12).
- Special findings in negligence case, see **NEGLIGENCE** 23.
- Questions relating to special findings, not grounds for a new trial, see **NEW TRIAL** 6.
- Special findings in suit between vendor and purchaser, see **VENDOR AND PURCHASER**.
23. *Special Findings.—Failure to Find Fact.—Effect.*—A failure to find a fact constitutes a finding against the party having the burden of proving such fact. *Bradley v. Harter*, 541, 546 (4).
24. *Special Findings.—Purpose.*—The purpose of a special finding is to set out the ultimate facts proved, and not conclusions therefrom, and, to authorize a recovery, such findings must contain every fact necessary thereto.
Cumberland Tel., etc., Co. v. Kranz, 67, 72 (1).
25. *Special Findings.—Request.—Appeal.*—A special finding made without a request therefor, will be treated on appeal merely as a general finding. *Hinshaw v. Security Trust Co.*, 351, 357 (7).
26. *Conclusions of Law.—Exceptions.—Special Findings.*—An exception to the conclusions of law admits, for the purposes of such exception, that the facts were correctly found.
Timmonds v. Taylor, 531, 535 (2).
27. *Conclusions of Law.—Defects.—Correct Judgment.*—The failure correctly to state conclusions of law, where a correct judgment is rendered on the facts found, constitutes harmless error.
Cumberland Tel., etc., Co. v. Kranz, 67, 73 (4).
28. *Conclusions of Law.—Exceptions.—Time of Taking.—Appeal.—Statutes.*—Section 656 Burns 1908, §626 R. S. 1881, providing that "the party objecting to the decision must except at the time the decision is made," is mandatory, and exceptions taken twenty-one days after conclusions are announced present no question on appeal.
Andis v. Smith, 162, 163 (1).

TRIAL—Continued.

29. *Conclusions of Law.—Amendments.—Exceptions.*—The trial judge, at any time while the action is *in fieri*, may recall and amend the special findings and conclusions of law, and the defeated party may at such time except to such conclusions, whether exceptions had originally been taken or not.

Andis v. Smith, 162, 165 (2).

TRUSTS—

See WILLS.

Reformation of deed to show, see REFORMATION.

1. *Express.—Creation of, by Parol.—Executed.*—The rule that an express trust in land cannot be created by parol has no application where the alleged express trust has already been executed.

McKnight v. Kingsley, 372, 376 (1).

2. *Constructive.—Equity.*—Where a person obtains the legal title to another's land by fraud, by violation of a confidential or fiduciary relation, or in any other unconscionable manner, equity impresses a constructive trust upon the land in favor of the beneficial owner.

Norris v. Kendall, 304, 307 (3).

3. *Express.—Resulting.—Fraud.—Deeds.*—Section 4019 Burns 1908, §2976 R. S. 1881, providing, among other things, that §4017 Burns 1908, §2974 R. S. 1881, which provides that "when a conveyance for a valuable consideration is made to one person, and the consideration therefor paid by another, no use or trust shall result in favor of the latter," "shall not extend to cases * * * where * * * by agreement and without any fraudulent intent, the party to whom the conveyance was made * * * was to hold the land * * * in trust for the party paying the purchase money," does not apply to a suit to reform a deed so as to create a trust in favor of plaintiffs, for the reason that such a trust is express, the statute applying only to resulting trusts.

Harvey v. Hand, 392, 398 (5).

"UNSOUND MIND"—

See WORDS AND PHRASES.

VARIANCE—

See PLEADING 30.

VENDOR AND PURCHASER—

See CONTRACTS; EASEMENTS; SUBROGATION.

Conveyance of land subject to liens, see FRAUDS, STATUTE OF.

1. *Liens.—Purchase of Land Subject to.—Presumptions.—Suretyship.*—One taking a deed "subject to all liens," does not become personally liable to pay such liens; but the land thereafter constitutes the primary fund from which such liens are to be paid, the presumption being that the amount of the liens was deducted from the purchase price.

Gregory v. Arms, 562, 567 (1).

2. *Liens.—Agreements to Pay.—Liability.*—A purchaser who accepts a deed containing a promise to pay existing liens becomes personally liable for the payment of such liens.

Gregory v. Arms, 562, 568 (2).

3. *Assumption of Payment of Liens.—Suretyship.*—Where a purchaser buys land encumbered by a mortgage, agreeing to pay such mortgage, the mortgagee, unless he has assented to such

VENDOR AND PURCHASER—Continued.

- action may be maintained by the mortgagee and the purchaser against the vendor, and the land constitutes the primary fund for the payment of the mortgage and a personal judgment for the remainder may be obtained. *Gregory v. Arms, 562, 563 (3).*
4. *Proof of Payment of Purchase Money.—Evidence.*—Where a deed is recorded which recites that the land is conveyed "subject to all liens" the purchaser is bound to pay the mortgage made on the land, and a judgment for the balance for \$3,500 being the purchase price less the mortgage for \$500 was rendered by the court in favor of the vendor. *Gregory v. Arms, 562, 570 (7).*
5. *Lien.—Specific Mortgage of One and Not of Another.—Evidence.*—A deed conveying land encumbered by two mortgages, the senior mortgage was to be assumed for payment by the purchaser, and it was shown that such vendor considered himself liable as a principal for the payment of the other mortgage for which he was liable under the provisions of his deed. *Gregory v. Arms, 562, 571 (8).*
6. *Recorded Deeds.—Liens.—Notice.*—A deed duly recorded containing a provision that the land is conveyed "subject to all liens" constitutes notice thereof to all subsequent purchasers, and is binding upon them, making such land the primary source of funds for the payment of such liens. *Gregory v. Arms, 562, 571 (9).*
7. *Contracts of Sale.—Tender.—Purchase Money.*—Where a contract for the sale of real estate is entire and its provisions are concurrent and dependent, an action for purchase money cannot be maintained until the vendor has tendered a deed conveying a merchantable title to the real estate. *Straus v. Yeager, 448, 453 (2).*
8. *Contracts of Sale.—Divisible.—Tender.*—An action for damages lies for the breach of a provision in an executory contract for the sale of real estate without the tender of a deed, where the contract is divisible and the obligations are independent. *Straus v. Yeager, 448, 454 (3).*
9. *Covenant to Convey.—Consideration.*—Where the covenant to convey is the consideration for the obligation to pay, a tender of the deed of conveyance is not an essential prerequisite to the collection of the debt. *Straus v. Yeager, 448, 454 (5).*
10. *Contracts of Sale.—Divisibility.*—Where vendors contracted, in consideration of \$50 cash, "\$9,000 to be paid in cash * * * on November 13," and \$1,000 to be paid on the following March 1, the balance to be secured by mortgage, to convey certain lands not later than March 1, such vendors may maintain an action for such payments as they become due, although they have not tendered a deed for such land, the contract being divisible. *Straus v. Yeager, 448, 454 (6).*
11. *Sales.—Payments.—Deeds.—Tender.—Amended Complaint.*—Where a vendee agreed to make a payment on a purchased farm on November 13, the deed to be executed not later than the following March 1, and a complaint for the collection of such payment was filed November 14, an amended complaint filed after March 1 need not show a tender of a deed, since an amended com-

VENDOR AND PURCHASER—Continued.

plaint relates back to the time of the filing of the original complaint. *Straus v. Yeager*, 448, 457 (9).

12. *Contracts of Sale.—Remedies for Breach.—Express Mention of.—Effect.*—Where a contract for the sale of real estate provides, among other things, that "if either of the parties shall fail or refuse to perform the stipulations hereof * * * the other parties may, by suit, enforce the specific performance * * * of this contract, * * * or may at their option recover from such defaulting party * * * whatever damages they may have suffered," the parties are not restricted to the remedies expressed, but may resort to any other legal remedies for redress.

Straus v. Yeager, 448, 458 (10), 460 (10), 461 (10).

13. *Contracts.—Sales of Lots.—Improvements.—Special Findings.*—Special findings that a vendor contracted with three purchasers to convey to them at or before the expiration of three years certain land by them to be platted, agreeing that as they sold the lots platted therefrom to execute deeds therefor and to credit the purchase price thereof to such purchasers, that he further agreed to advance the money necessary for certain street improvements, charging the amount used in addition to the original purchase price, that the interest of two of such purchasers was purchased by two others, that the remaining one of the original purchasers executed an interest-bearing receipt for money advanced, that such purchaser had power to receive and expend money for such improvement, that he did not have power to execute such receipt, that such vendor had notice thereof, that the vendor performed all parts of the contract to be performed on his part, and that such sum so advanced has never been repaid to the vendor, and is due, sustain conclusions of law in favor of the vendor.

Bradley v. Harter, 541, 546 (5).

14. *Vendor's Liens.—Subsequent Purchasers.—Notice.—Special Findings.*—Special findings in a suit to establish and enforce a vendor's lien, that prior to the conveyance of the real estate in question to defendant "he had notice and knowledge of said notes due to plaintiff * * * which were claimed to be notes as a part of the purchase money of said real estate," are insufficient to show that defendant had notice that such notes evidenced a part of the purchase price of such real estate; and the burden being on plaintiff to establish such fact, the findings do not support a decree in her favor.

Malon v. Scholler, 691, 694 (3).

15. *Liens.—Payment.—Consideration.*—A vendor who had mortgaged his land, afterwards conveying it, orally agreeing to pay such mortgage, is not a surety in the payment of the mortgage, but a principal; and the consideration for his original mortgage is sufficient to support the subsequent agreement to pay such mortgage, where he and his grantee mutually agree in determining the purchase price that the mortgage shall be paid by such vendor.

Gregory v. Arms, 562, 574 (12).

16. *Covenants in Prior Deeds.—Effect.—Presumptions.*—A purchaser is bound by the terms of covenants contained in prior deeds to the lands purchased; and he is presumed to know thereof.

Gregory v. Arms, 562, 569 (4).

17. *Covenants in Prior Deeds.—Effect.*—A purchaser whose vendor agreed in his deed to accept the deed to the land in question, "subject to all liens," is bound thereby, though no mention is made in his deed of one of such liens.

Gregory v. Arms, 562, 569 (5).

VENDOR AND PURCHASER—Continued.

18. *Contract to Accept Defective Title.*—One may contract to accept a defective title, or to make payments before obtaining title, but he cannot afterwards be heard to say that another rule would have been applicable in the absence of such agreement.

Straus v. Yeager, 448, 457 (7).

VENIRE DE NOVO—

See PLEADING 26, 27.

VENUE—

Making additional parties after change of, see PARTIES.

Transcript showing filing of complaints, where change of venue was granted, see APPEAL 16; *Mesker v. Fitzpatrick*, 518.

Change of.—Effect.—The court to which a cause of action has been transferred by a change of venue has sole jurisdiction thereof and should proceed with the case as though such case had originated in such court. *Niagara Oil Co. v. Jackson*, 238, 245 (7).

VERDICT—

See TRIAL.

WAIVER—

See APPEAL; INSURANCE.

Of defenses to street assessments, see MUNICIPAL CORPORATIONS 10.

Definition.—Insurance.—Waiver imports the intentional relinquishment of a known right; an election to dispense with something of value, or to forego some advantage.

Shedd v. American Credit, etc., Co., 23, 28 (4).

WATERS—

See RAILROADS.

Collecting and discharging, see NUISANCE 5; *Niagara Oil Co. v. Jackson*, 238, 245 (6).

1. *Surface.—Artificial Flowage.—Damages.*—The owner of land over which surface-waters naturally flow has no cause of action therefor, but he has a cause of action where the overflowing waters have been artificially collected and discharged upon such land. *Niagara Oil Co. v. Jackson*, 238, 242 (3).

2. *Streams.—Pollution.—Cities.*—While lower riparian owners have been held remediless in cases where streams have been polluted by upper proprietors, or cities, the conservation of the public health requires that such holdings should be largely restricted; and cities have no right to cast polluted water on the surface so that it will flow upon a servient owner's land.

Niagara Oil Co. v. Jackson, 238, 242 (4).

WILLS—

See DEEDS.

1. *Construction.—Intent.*—The purpose in construing a will is to ascertain the testator's intent.

Devin v. McCoy, 379, 381 (1).

Snyder v. Greendale Land Co., 178, 184 (4).

2. *"Contingencies."—Meaning of.*—The word "contingencies," as used in a will providing that the trustee shall hold certain prop-

WILLS—Continued.

erty "until the contingencies named," imports some future event that may or may not occur. *Devin v. McCoy*, 379, 382 (3).

3. *"Unsound Mind."*—*Statutes.*—The words "unsound mind," as used in §3112 Burns 1908, §2556 R. S. 1881, providing that "all persons, except infants and persons of unsound mind, may devise," etc., import such a degree of unsoundness of mind, as, measured according to the standard fixed by the adjudicated cases, incapacitates a person from making a will.

Humphrey v. Mottier, 469, 472 (1).

4. *Trusts.—Termination.*—A trust created by a will bequeathing and devising to testator's two grandchildren the share that their deceased father would have received, "subject to the conditions hereinafter named," and providing for a trustee to take and to hold such property for such children "until the contingencies named in the next succeeding clause of the will, in the meantime using of the profits thereof enough only for their education and economical support," and providing that "if [plaintiff] dies before he has children born unto him, his share of [testator's] estate shall go to his sister, * * * if she survives him," is not a spendthrift trust, and terminates upon the birth of a child to the plaintiff.

Devin v. McCoy, 379, 381 (2), 382 (2).

5. *Construction.—Words.*—"Descendants."—"Issue."—In construing a will, the word "descendants" is sometimes used in a restricted sense; and the word "issue," which is coextensive with the word "descendants" and includes every degree thereof, may import children only. *Snyder v. Greendale Land Co.*, 178, 184 (5).

6. *Deeds.—Testamentary Disposition of Property.*—Where deeds are made to children and placed in the hands of another to be delivered at the death of the grantor, and such grantor in his will directs that such deeds be delivered as directed, the deeds being made a part of the will by reference, the deeds and the will will be construed together as constituting a testamentary disposition of such property.

Snyder v. Greendale Land Co., 178, 183 (2).

WITNESSES—

Cross-examination of party, see **PHYSICIANS**.

Competency of claimant to testify in claim against decedent's estate see **EXECUTORS AND ADMINISTRATORS 2**; *Dearing v. Coulson*, 414, 416 (3).

1. *Competency.—Decedents' Estates.—Claimants.—Testimony of.—Abuse of Discretion.*—Under §526 Burns 1908, Acts 1883 p. 102, providing that in claims against decedents' estates, the court "may, in its discretion, require any party to a suit or other person to testify, and any abuse of such discretion will be renewable [reviewable] upon appeal," a trial judge's direction for a claimant to testify in her own behalf, is reviewable for an abuse of discretion; but each case should be decided upon its own merits.

Dearing v. Coulson, 414, 415 (2).

2. *Competency.—Default Judgment.—Husband and Wife.—Fraudulent Conveyances.*—In a suit to set aside an alleged fraudulent conveyance made by a husband to his wife, such husband and the trustee through whom the transfer was made are competent witnesses in behalf of such wife, though a default judgment was taken against such husband. *McKnight v. Kingsley*, 372, 378 (4).

WORDS AND PHRASES—

- "Assessments," statutory meaning of, see **MUNICIPAL CORPORATIONS** 15; *Brownell Improv. Co. v. Niron*, 195, 201 (4).
- "Descendants," meaning of, see **WILLS** 5; *Snyder v. Greendale Land Co.*, 178, 184 (5).
- "Contingencies," meaning of, see **WILLS** 2; *Devin v. McCoy*, 379, 382 (3).
- "Heirs" and "heirs of the body," estate limited to, gives taker a fee simple, see **DEEDS** 2; *Snyder v. Greendale Land Co.*, 178, 183 (1).
- "Issue," meaning of, see **WILLS** 5; *Snyder v. Greendale Land Co.*, 178, 184 (5).
- "May" and "must," use of in instructions, see **MASTER AND SERVANT** 27; *Republic Iron, etc., Co. v. Lulu*, 271, 280 (9).
- "Sold," meaning of, see **ACCOUNTS**; *Pennsylvania, etc., Sup. Co. v. Fosnotte*, 166, 168 (2).
- "Taxes," statutory meaning of, see **MUNICIPAL CORPORATIONS** 15; *Brownell Improv. Co. v. Niron*, 195, 201 (4).
- "Unsound mind," meaning of, see **DEEDS** 1; **WILLS** 3.

WORK AND LABOR—

1. *Compensation.—Payment.—Evidence.*—Where plaintiff alleges that, by contract, she was to receive \$1.50 a week for her services, and that if she remained with decedent and his wife during their lives, she was to receive certain land, and the evidence shows that she so remained, and that she received \$1.50 a week, it is for the jury to determine whether she was paid in full.
Hedrick v. Hedrick, 658, 661 (2).
2. *Burden of Proof.—Harmless Error.*—In an action for services rendered, an instruction that if the claimant rendered any services "for which she had not already been paid, she would be entitled to recover the reasonable value thereof, unless they were gratuitously rendered, and the burden is on defendant to show that they were rendered gratuitously, if rendered at all," is erroneous, the burden being upon plaintiff to establish affirmatively her right to recover; but such error was harmless, where there was no evidence that such services were rendered gratuitously.
Hedrick v. Hedrick, 658, 661 (3).
3. *Evidence.—Explanations Not Called for.*—In an action for work and labor, the plaintiff being asked if he had "any negotiations" with defendant relative to the work in question, his answer that he "did," followed by defendant's conversation in reference thereto is not harmful, where such conversation, though unresponsive, was admissible within the issues. *Week v. Rawie*, 599, 602 (5).
4. *Evidence.—Conclusions.*—In an action for work and labor, the question to the plaintiff "Did you agree to take charge of said surveying?" called for a conclusion; but such question was not harmful, where the plaintiff had testified to the defendant's request for him to do the work and of his performance thereof, the request and performance entitling plaintiff to a recovery.
Week v. Rawie, 599, 602 (6).
5. *Evidence.—Declarations.*—In an action for work and labor, the plaintiff being asked to state what was said by defendant as to time of work and pay, his answer that defendant "agreed" to pay him \$125 a month and expenses must have been understood by

WORK AND LABOR—Continued.

the jury to mean that defendant "said" that he would pay him such sum, and was, therefore, harmless.

Week v. Rawie, 599, 603 (7).

6. *Evidence.—Improper Question.—Proper Answer.*—In an action for work and labor, an improper question answered by a statement of the time plaintiff commenced and quit work, is harmless, such answers being competent. *Week v. Rawie*, 599, 603 (8).

7. *Evidence.—Person for Whom Labor Was Performed.*—In an action for work and labor, the plaintiff being asked whether he had negotiated with anyone besides defendant for the performance thereof, his answer that he had not, followed by explanations that he had talked to no one else, does not constitute reversible error. *Week v. Rawie*, 599, 603 (9).

8. *Agreements of Agents to Pay.—Instructions.*—In an action against defendant for work and labor, an instruction that if plaintiff performed the work alleged, and was employed by an officer of a corporation to do such work for such company, and the work was done pursuant thereto, the defendant would not be liable "unless he expressly agreed to pay the same," is not erroneous, since an express promise by defendant to pay for work done at his request imports an original undertaking for himself, and such request coupled with performance by plaintiff shows a consideration for the contract. *Week v. Rawie*, 599, 604 (10).

9. *Executors and Administrators.—Evidence.—Declaration of Party.*—In an action by a daughter for services rendered to her father under his alleged promise to pay therefor, evidence of the father's declarations as to his intention of holding an insanity inquest on such daughter is inadmissible.

Eppert v. Gardner, 188, 195 (11).

10. *Executors.—Claims.—Evidence.—Decedent's Declarations.*—In an action by a daughter against the executor of her father's will for services rendered under his alleged promise to pay therefor, declarations by such father, against the interests of the daughter, and in her absence, are not admissible, being self-serving.

Eppert v. Gardner, 188, 194 (10).

11. *Parent and Child.—Services.—Jury.—Appeal.*—Evidence tending to show that the plaintiff, after she became twenty-one years old, and at the request of her father, remained at home and cared for her mother and him until they died, in pursuance of a promise by him to will her the homestead, supports a verdict in her favor for the value of the services, the father failing to provide for her as agreed in the will; and such verdict is conclusive on appeal.

Eppert v. Gardner, 188, 193 (5).

12. *Parent and Child.—Promise of Compensation.—Presumptions.*—A promise by a parent to compensate his child for services to be performed rebuts the legal presumption that such services are gratuitously performed. *Eppert v. Gardner*, 188, 193 (6).

13. *Parent and Child.*—A daughter who, after arriving at the age of twenty-one years, works for her parents, under a contract, express or implied, can recover therefor.

Eppert v. Gardner, 188, 192 (4).

14. *Decedents' Estates.—Parent and Child.—Services.—Complaint.—Another Action Pending.*—A complaint alleging that the plaintiff after she was twenty-one years old, was induced to care for

WORK AND LABOR—Continued.

her mother and father during the remainder of their lives by the promise of her father that he would will to her the homestead. that accordingly she performed such services, that her father so executed his will, but that shortly prior to his death he destroyed it and executed another, leaving such property to another, and demanding the value of her services, is sufficient; and the objection that another action was pending for the same cause is not sustained, where the complaint does not show such facts.

Eppert v. Gardner, 188, 190 (1).

15. *Contracts.—Complaint.—Bills of Particulars.*—A complaint for services, to which, immediately after the body thereof, a bill of particulars was subjoined, showing the items of such work, is sufficient when questioned for the first time on appeal, or by motion in arrest, after verdict, though such bill is nowhere, in the body of the complaint, referred to or made a part thereof.

Oliver Typewriter Co. v. Vance, 21, 22 (2).

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